(24,523)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 779.

NORFOLK SOUTHERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WALTER G. FEREBEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 10, 1915.

1 In the Supreme Court of North Carolina, August Term, 1914.

No. 247.

WALTER G. FEREBEE
vs.
NORFOLK SOUTHERN RAILROAD COMPANY.

Petition for Writ of Error.

To the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina:

Norfolk Southern Railroad Company, the above-named defendant in the above-entitled action, respectfully shows:

That the Supreme Court of North Carolina, which is the highest Court in the State of North Carolina in which a decision in the said action could be had, at the August Term, 1914, of said Court rendered a judgment against your petitioner in the above-entitled action, wherein Walter G. Ferebee was plaintiff, and your petitioner, Norfolk Southern Railroad Company, was defendant.

That in the proceedings had and judgment rendered certain errors were committed to the prejudice of the petitioner, all of which more fully appears in the assignment of errors filed herewith.

In said action a right, privilege and immunity was duly and specially set up and claimed by your petitioner under the Constitution and under a statute of the United States; and the decision of the Supreme Court of North Carolina was against the right, title and immunity so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herewith.

Wherefore, And in as much as your petitioner feels aggrieved by the said final decision of the Supreme Court of North Carolina in rendering judgment against it in this action, it respectfully
2 prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correction of the errors complained of, that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of North Carolina herein may be reversed and annulled.

R. N. SIMMS,
Attorney Norfolk Southern Railroad Company, Defendant.

STATE OF NORTH CAROLINA,
In the Supreme Court, ss:

Let the writ of error prayed for issue upon the execution of a bond by the Norfolk Southern Railroad Company, payable to Walter G.

Ferebee in the sum of Twenty-five thousand Dollars ($25,000), such bond, when approved, to act as a supersedeas.

14 Dec., 1914.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

3 In the Supreme Court of North Carolina, Fall Term, 1914.

No. 247.

WALTER G. FEREBEE, Plaintiff (Defendant in Error),
vs.
NORFOLK SOUTHERN RAILROAD COMPANY, Defendant (Plaintiff in Error).

Assignment of Errors.

Now comes the above-named Norfolk Southern Railroad Company, plaintiff in error, and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above-entitled case, and, for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments:

This is a civil action brought by Walter G. Ferebee against the Norfolk Southern Railroad Company to recover damages for personal injuries alleged to have been sustained by the plaintiff (defendant in error) while employed by the defendant (plaintiff in error) as a baggage-master and fireman on one of the trains of the defendant (plaintiff in error), which was being operated between Raleigh, N. C., and Norfolk, Va., and which was alleged and admitted to have been engaged in interstate commerce. Both the plaintiff and the defendant were at the time of the said injury engaged in commerce between states. The case is one arising under the provisions of the act known as the Federal Employers' Liability Act, approved by Congress of the United States, April 22, 1908. The action was tried in the Superior Court of Wake County, North Carolina, at the February Term, 1913, and judgment rendered in favor of the plaintiff (defendant in error) and against the defendant (plaintiff in error), from which judgment the defendant (plaintiff in error) appealed to the Supreme Court of North Carolina,

4 and upon such appeal the Supreme Court of North Carolina, at the Fall Term, 1913, ordered a new trial as to the issue of damages. The action was tried again at the March Term, 1914, of Wake Superior Court, and judgment rendered in favor of the plaintiff (defendant in error), from which judgment the defendant (plaintiff in error) appealed to the Supreme Court of North Carolina, and, at the Fall Term, 1914, the said Supreme Court of North Carolina affirmed the said judgment of the Superior Court of Wake County.

There appeared in the testimony of the plaintiff himself evidence

tending to show negligence on his part causing or contributing to the injuries he suffered, but the Superior Court of Wake County refused to allow the trial jury to consider this evidence, and refused to allow the defendant (plaintiff in error) to introduce evidence of such negligence on the part of the plaintiff (defendant in error), and the Supreme Court of North Carolina sustained the action of the said Superior Court, and thereby erred in its construction of the Federal Employers' Liability Act, a statute of the United States, approved by Congress on April 22, 1908; and by this error the Supreme Court of North Carolina decided against the defendant (plaintiff in error) and the rights set up and claimed by your petitioner under the said statute. There being some evidence of contributory negligence on the part of the plaintiff (defendant in error), the Supreme Court of North Carolina erred in refusing to allow the jury to consider the same in the second trial in passing upon the issue as to damages.

Norfolk Southern Railroad Company, defendant in the Court below and plaintiff in the Supreme Court of the United States, respectfully assigns as errors in the record and proceedings in this case in the Supreme Court of North Carolina the following:

1. That the Supreme Court of North Carolina erred in awarding a new trial upon the issues of damages only at the Fall Term, 1913, of said Court; this being an action arising under the provisions of the Act of Congress entitled, "An act Relating to the Liability of Common Carriers by Railroad to their Employees in certain cases," approved April 22, 1908, enacted by Congress in pursuance of the power conferred upon and vested in it by Article 1, Section 8, Clause 3, of the Constitution of the United States.

2. At the second trial the defendant (plaintiff in error) tendered an issue reading as follows: "What amount shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to plaintiff's own negligence?" The Superior Court refused to submit this issue, and the defendant (plaintiff in error) excepted, and the Supreme Court of North Carolina erred in overruling the said exception of the defendant (plaintiff in error). (This was defendant's (plaintiff in error) exception number one.)

3. The Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to the issue as submitted by the Superior Court at the second trial, which was in the following language: "What amount of damages is the plaintiff entitled to recover of the defendant on account of its negligence?" (Defendant's Exception No. two.)

4. "The plaintiff testified on his direct examination that he was injured by stepping from the front platform of a passenger coach just in the rear of the baggage car at night by reason of the fact that the steps had been knocked off at the side of the said platform. There was evidence that these steps had been on the train and used when it left the station at Raleigh, less than an hour before. The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the

steps were, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no such examination to see whether they were there, and that he was at the time
6 both a baggage-master and flagman.

"On cross-examination he was asked if the rules of the defendant company in force and effect at the time of the injury did not require him as a flagman to make such an examination and see for himself whether the steps were in good condition before using the steps or attempting to use them. There was objection by the plaintiff.

"Defendant's (plaintiff in error) counsel stated to the Court: 'It is the purpose of the defendant in asking this question to show that the rules of the defendant (plaintiff in error) company in effect at the time complained of, and known to the plaintiff (defendant in error), prescribed and required that the plaintiff (defendant in error), being engaged as a flagman as well as a baggage-master, must examine and know for himself that the steps were in proper condition before using them. It is our further purpose in this regard to show this as evidence bearing upon the plaintiff's (defendant in error) capability as an employee, tending to show his disobedience and non-observance of the rules of his employer, known to him at the time, and is requested to be admitted and considered only as bearing upon the issue of damages.'

"The plaintiff's (defendant in error) objection was sustained, and the defendant (plaintiff in error) excepted: and this was the defendant's (plaintiff in error) eighth exception."

The defendant (plaintiff in error) specially contended in the Court below that it was entitled to have this evidence considered upon a trial of the issue of damages under the Federal Employers' Liability Act. The Supreme Court of North Carolina sustained the action of the Court below, and committed error in so overruling the exception of the defendant (plaintiff in error).

5. For that the Supreme Court of North Carolina committed error in affirming the action of the Superior Court in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error), to-wit:
7 "The plaintiff's (defendant in error) right to recover in this action is based upon the Act of Congress known as the Federal Employers' Liability Act, and, under the terms of the act, the conduct of the plaintiff (defendant in error) cannot be considered as a defense to the action to the extent of destroying the plaintiff's (defendant in error) right to recover, but in arriving at the amount of damages you can consider the plaintiff's (defendant in error) conduct and the extent to which the injury complained of was brought about by such conduct, and if you find, by the greater weight of the evidence, that the plaintiff (defendant in error) failed to look before attempting to alight from the train at Wendell, and that by looking he could have seen that the steps were missing, and could have avoided falling under the cars, it is your duty to consider such facts in arriving at your answer to the issue sub-

mitted to you." This was the defendant's (plaintiff in error) fifteenth exception.

6. For that the Supreme Court of North Carolina committed error in affirming the action of the Superior Court in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error), to-wit:

"Under the Federal Employers' Liability Act, the conduct of the plaintiff is to be considered by the jury in determining the amount of damages, and in answering the issue in this case you can consider the conduct of the plaintiff, Walter G. Ferebee, at the time of his injury, in reduction of the damages which you find he has sustained." This was the defendant's (plaintiff in error) sixteenth exception.

7. For that the Supreme Court of North Carolina committed error in refusing to hold that the trial Court committed error in instructing the jury as follows, to-wit:

"The jury is instructed that they will not give any consideration to the issue of negligence or to the issue of contributory negli-
8 gence. They are instructed by the Court that these two issues are behind us." This was the defendant's (plaintiff in error) twenty-sixth exception.

8. For that the Supreme Court of North Carolina committed error in upholding the action of the trial Court in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error), to-wit:

"The plaintiff, Walter G. Ferebee, as a party to this action, has an interest in the outcome of such a character that it is your duty to scrutinize his evidence with care and to give due consideration to the fact that he is interested."

The trial Judge refused to give this instruction as requested, but added thereto the following: "That is the extent of your consideration, and I do this because the Supreme Court has held that it must be done, but after you have done so, and you shall conclude that he told the truth, you will give the same weight to his evidence that you would to that of any other credible witness," and gave the same in this modified form. This was defendant's (plaintiff in error) twentieth exception in the Court below.

9. For that the Supreme Court of North Carolina committed error in refusing to hold that the trial Court committed error in instructing the jury as follows, to-wit:

"The rule for ascertainment of damages where the plaintiff has been injured by the negligent conduct of the defendant is that he is entitled to recover damages for past and prospective loss resulting from the defendant's wrongful act, and this may embrace indemnity for actual expenses, nursing, medical attention, and loss of time and disability to work and capacity to earn money, and where, as in this case, it is alleged that there is a permanent disability, and so found by the jury, there should be this element of damage; that is, a compensation for permanent disability, and that is to be determined by the jury."

9 There was no evidence of any actual expense by the plaintiff for nursing. (This was defendant's twenty-third exception.)

10. For that the Supreme Court of North Carolina committed error in refusing to hold that the trial Court committed error in instructing the jury as follows, to-wit:

"The Court charges you that in this case the plaintiff is entitled to recover as damages one compensation for all of the injuries he has sustained, past and prospective, in consequence of the defendant's wrongful and negligent acts, and the damages awarded are understood to embrace indemnity for actual nursing and medical expenses and loss of time, loss from inability to perform ordinary labor, or incapacity to earn money. The plaintiff is to have a reasonable satisfaction for the loss of both bodily and mental powers, for actual suffering both of mind and body, which are immediate and necessary consequences of the injury."

There was no evidence that the plaintiff had paid anything as nursing expenses. This was the defendant's (plaintiff in error) twenty-ninth exception.

11. For that the Supreme Court of North Carolina committed error in upholding the trial Court in its refusal to grant a new trial. This was the defendant's (plaintiff in error) thirty-first exception in the Court below.

12. For that the Supreme Court of North Carolina committed error in upholding the trial Court in refusing to set aside the verdict. This was the defendant's (plaintiff in error) thirtieth exception in the Court below.

13. For that the Supreme Court of North Carolina committed error in upholding the trial Court in refusing the defendant's (plaintiff in error) motion for judgment non obstante veredicto. This was the defendant's (plaintiff in error) thirty-third exception in the Court below.

14. For that the Supreme Court of North Carolina com-
10 mitted error in refusing to sustain the defendant's (plaintiff in error) exception to the judgment as signed by the trial Court. This was the defendant's (plaintiff in error) thirty-fourth exception in the Court below.

15. For that the Supreme Court of North Carolina committed error in rendering the final judgment it did against the defendant (plaintiff in error), Norfolk Southern Railroad Company, and which is complained of in this case.

16. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action in that the defendant (plaintiff in error) has been denied a construction of the Federal Employers' Liability Act, to which it was entitled, and which, if granted, would have defeated the plaintinff's (defendant in error) right to the judgment he recovered herein.

17. For that the Supreme Court of North Carolina for the various reasons above set forth committed error in rendering the final judgment it did against the defendant (plaintiff in error) in this action.

Wherefore, For these, and other manifest errors appearing in the record, the Norfolk Southern Railroad Company prays that the

judgment of the said Supreme Court of North Carolina be reversed, set aside, and held for naught, and that judgment be rendered for plaintiff in error granting it its rights under the Constitution and statutes of the United States, and plaintiff in error also prays for judgment for its costs.

R. N. SIMMS,
Attorney for Norfolk Southern Railroad Company,
Defendant (Plaintiff in Error).

11 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court, before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between Walter G. Ferebee, Plaintiff, and the Norfolk Southern Railroad Company, a corporation, Defendant, wherein was drawn in question the construction of a clause of the Constitution, and a statute, of the United States, and the decision was against the right, privilege or immunity specially set up or claimed under such clause of the said Constitution and such statute, a manifest error hath happened, to the great damage of the Norfolk Southern Railroad Company, as by its complaint appears. We being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, D. C., within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 18 day of December, in the year of our Lord One Thousand, Nine Hundred and Fourteen.

[Seal of the United States District Court, Eastern Dist. N. C., at Raleigh.]

ALEX. L. BLOW,
Clerk of the District Court of the United States,
Eastern District of North Carolina.

Allowed:
WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

12 STATE OF NORTH CAROLINA:

I, Joseph L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify that the within writ of error, together with the petition therefor and the assignments of error, and the appellant's bond, together with copies of all of the same for the undersigned Clerk, and also together with copies of all of the same for Walter G. Ferebee, Defendant in Error, were on the 18 day of December, 1914, lodged in my office as Clerk of the Supreme Court of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

13 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Walter G. Ferebee, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of North Carolina, wherein Norfolk Southern Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of North Carolina, this 18 day of December, 1914.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

14 NORTH CAROLINA,
Wake County:

I hereby certify that I received the within citation on the 18 day of December, 1914, and that I served the same on the 18 day of December, 1914, by reading the same and delivering a copy thereof to W. C. Douglass, attorney of record for Walter G. Ferebee (plaintiff), Defendant in error.

I further certify that I received the within petition for writ of error, and assignment of errors, and writ of error, and bond of appellant, on the 18 day of December, 1914, and that on the said 18 day of December, 1914, I delivered copies of the said petition for writ of error, assignments of error, writ of error, and bond of ap-

pellant, to W. C. Douglass, attorney of record for Walter G. Ferebee (plaintiff), Defendant in Error.

This 18 day of December, 1914.

J. H. SEARS,
Sheriff of Wake County, North Carolina,
By J. J. HARWARD, *Deputy Sheriff.*

15 In the Supreme Court of North Carolina.

NORFOLK SOUTHERN RAILROAD COMPANY, Plaintiff in Error,
vs.
WALTER G. FEREBEE, Defendant in Error.

Bond.

Know all men by these Presents, That we, Norfolk Southern Railroad Company, a corporation of the State of Virginia, as principal, and United States Fidelity & Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto Walter G. Ferebee in the full and just sum of Twenty-five Thousand Dollars ($25,000.00) for the payment of which sum well and truly to be made we hereby jointly and severally bind ourselves and each of our successors firmly by these presents.

Sealed with our seals and dated this 18th day of December in the year 1914.

Whereas, lately at a hearing before the Supreme Court of North Carolina, in a suit depending in said Court between the said Walter G. Ferebee, as plaintiff, and the said Norfolk Southern Railroad Company as defendant, a final judgment was rendered against said Norfolk Southern Railroad Company, and said Norfolk Southern Railroad Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment:

Now, therefore, the condition of this obligation is such that if the said Norfolk Southern Railroad Company, as plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise
16 to remain in full force and effect.

[L. S.] NORFOLK SOUTHERN RAILROAD COMPANY,
By J. H. YOUNG, *President.*

[Corporate seal of Norfolk Southern R. R. Co. here.]

THE UNITED STATES FIDELITY & GUARANTY CO.,
By A. M. MAUPIN & CO., *Agents.*
By W. B. JONES, *Atty.*

Attest:
U. S. HAWKINS, [L. S.]
Secretary of Norfolk Southern Railroad Co.

[Seal of Surety Company here.]

2—779.

Bond approved and to operate as a supersedeas. This December 18, 1914.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

17 No. 247.

FEREBEE
against
NORFOLK-SOUTHERN RAILROAD CO.

From Wake.

Before Cooke, J. Defendant Appealed.

Caption.

STATE OF NORTH CAROLINA,
Wake County:

Be it remembered, that on the 13th day of July, A. D. 1912, Walter G. Ferebee sued and prosecuted out of the office of the Clerk of the Superior Court of Wake County against the Norfolk Southern Railroad Company a summons for relief in the words and figures as follows, to wit:

Summons for Relief.

In the Superior Court.

WAKE COUNTY:

WALTER G. FEREBEE
v.
NORFOLK-SOUTHERN RAILROAD COMPANY.

The State of North Carolina to the Sheriff of Wake County, Greeting:

You are hereby commanded to summon Norfolk-Southern Railroad Company, the defendant above named, if it be found within your county, to be and appear before the Judge of our Superior Court, at a court to be held for the county of Wake, in the courthouse in Raleigh, on the third Monday after the first monday of September, it being the 23d day of September, 1912, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of said term; and let the said defendant take notice, that if it fail to answer the complaint within the time required by law, the
18 plaintiff will apply to the Court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 13th day of July, 1912.

MILLARD MIAL,
Clerk Superior Court.

Prosecution Bond.

We acknowledge ourselves bound unto Norfolk-Southern Railroad Company, the defendant in this action, in the sum of two hundred dollars; to be void, however, if the plaintiff, Walter G. Ferebee, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 13th day of July, 1912.

WALTER G. FEREBEE. [SEAL.]
GEO. B. FLEMING. [SEAL.]

Return of Summons.

And on the return day of said summons, to wit, on the third Monday after the first Monday of September, A. D. 1912, at the courthouse in Raleigh, before the Honorable G. S. Ferguson, Judge presiding, J. H. Sears, Sheriff of Wake County, returns said summons endorsed as follows, to wit:

Received July 18, 1912. Served July 18, 1912, by reading the within summons to and delivering a copy of the same to D. V. Conn, agent at Raleigh, N. C., for Norfolk-Southern Railroad Company.

J. H. SEARS,
Sheriff Wake County.
By J. J. HARWARD, *D. S.*

And thereafter, to wit, on the 31st day of August, A. D. 1912, the plaintiff, Walter G. Ferebee, by his attorneys, Messrs. Douglass, Lyon & Douglass and W. W. Elliott, comes and complains as follows, to wit:

19 *Complaint.*

NORTH CAROLINA,
Wake County:

In the Superior Court, September Term, 1912.

WALTER G. FEREBEE
v.
NORFOLK-SOUTHERN RAILROAD COMPANY.

The plaintiff, complaining of the defendant, alleges:

1. That on the 2d day of June, 1912, the defndant was a

corporation duly chartered and organized and was engaged in the operation of several lines of railway for the transportation of freight and passengers as a common carrier, one of its said lines of railway extending from Raleigh, N. C., via Wendell, N. C., and other points and stations to Norfolk, Va.

2. That on the said 2d day of June, 1912, the plaintiff, a young man 28 years of age, in perfect health and strength and sound in body and mind, was in the employ of the defendant as baggage master and flagman on one of defendant's mixed trains which was being operated from Raleigh, N. C., to Norfolk, Va., and on the night of the said 2d day of June, 1912, the said train, known and designated as "No. 6," was scheduled to leave Raleigh at 9:15 o'clock p. m.; that said train left Raleigh on the said 2d day of June, 1912, at the time designated and scheduled and proceeded on its way towards Norfolk, Va., and the plaintiff was in and upon said train in the discharge of his duty as baggage master and flagman. That it was the duty of the plaintiff as baggage master and flagman on said train, among other things, to assist passengers in getting on and off said train and to receive United States mail for carriage on said train at stations, and under the rules, custom and express orders and commands of the defendant it was his duty to be prepared for this service by placing himself in a position on the steps of the passenger coach which was adjacent to the baggage car, immediately after the train blew for stations and while the train was still in motion and approaching said station.

3. That the train hereinbefore referred to consisted of a locomotive engine and tender, one box car, two day coaches, and one Pullman car, in the order given. That the passenger car next to the baggage car on said train was constructed with a platform on each end thereof, and prior to the night of the injury to plaintiff as hereinafter alleged, there were steps on either side of said platforms for the convenience and safety of passengers and employees in getting off and on said car; that said platforms were about four feet from the ground. That on the said 2d day of June, 1912, the defendant carelessly, recklessly, and negligently, as plaintiff is informed and believes, tore and broke the steps from the front platform of said car, and without any notice or warning to the plaintiff ran and operated said passenger car from Raleigh to Wendell, N. C., a distance of about twenty miles, without any steps on one side of the front platform of said car, to wit, the side nearest the depot at Wendell, N. C., leaving an unguarded and dangerous opening in the space provided for said steps, so that a person in attempting to step from the said platform in the usual and ordinary way would fall beneath the cars of said train and on the track of said railway.

4. That as the said train upon which the plaintiff was employed as aforesaid, and at the time aforesaid, was approaching the station at Wendell, N. C., upon the signal being given by the engineer of said train for stopping at said station and while the train was still in motion, the plaintiff, as it was his duty to do, went upon the platform of said car for the purpose of stationing

himself on the steps of said car nearest the station, and in attempting to descend from the platform in the usual and ordinary way in the performance of his duties as aforesaid, he, without any fault on his part, fell through the opening from which the steps had been carelessly, recklessly and negligently removed by the defendant as aforesaid, and underneath the moving cars of said train and was wounded, mangled, bruised, dragged and crushed, as hereinafter described, to his great damage. That the night on which the plaintiff fell as aforesaid was very dark and the car from which he fell so poorly, carelessly and negligently lighted that it afforded the plaintiff no light, and a person descend-
21 ing from the platform in the usual and ordinary way could not have discovered the absence of said steps.

5. That, as plaintiff is informed and believes, the steps of the said car were torn from said platform directly after the said train left the city of Raleigh by the negligence and carelessness of the engineer operating said locomotive on said train in running the said steps against an obstruction which had been carelessly and negligently placed too near the track of the defendant by the employees of the defendant.

6. That when plaintiff fell from the platform as aforesaid he was dragged by the moving train for a considerable distance, his left hand was severed above the wrist, his scalp was horribly cut, lacerated, bruised and torn from his head, his head was cut, bruised and crushed, his face cut, bruised and disfigured, his neck was wrenched, his back injured, the drum of his left ear broken, he has been rendered extremely nervous, is unable to sleep at night, has suffered and continues to suffer great physical pain and mental anguish, and was otherwise seriously and permanently injured, has lost much time from his occupation, has been totally incapacitated from performing manual labor, has expended large sums for medical attention and medicines, and has been damaged in the sum of seventy-five thousand dollars.

7. That the plaintiff was injured by the negligence of the defendant in the following particulars, to wit, in negligently, carelessly and recklessly breaking, tearing and removing the steps from said passenger coach without giving the plaintiff any notice or warning; in negligently operating and running its passenger coach without steps, rendering the place in which the plaintiff was required to perform his duties unsafe and dangerous and in failing to properly light said platform, as aforesaid; and negligently failing to guard the dangerous opening caused by the removal of said steps.

Wherefore, the plaintiff prays for judgment against the defendant in the sum of seventy-five thousand ($75,000) dol-
22 lars, the costs of this action, and such other and further relief, etc.

DOUGLASS, LYON & DOUGLASS,
W. W. ELLIOTT,
Attorneys for Plaintiff.

STATE OF VIRGINIA,
City of Norfolk, To wit:

Personally appeared before me this day Walter G. Ferebee, to me personally known, — being duly sworn, deposes and says that he has read the foregoing complaint and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those he believes it to be true.

WALTER G. FEREBEE.

Sworn and subscribed before me, this 30th day of August, 1912.

EVALYN S. ROMER,
Notary Public.

[SEAL.]

My commission expires June 20, 1915.

I hereby certify that no tax is required by the laws of Virginia on the seal affixed to this instrument.

EVALYN S. ROMER,
Notary Public.

And thereafter, to wit, on the 4th day of October, A. D. 1912, the defendant, Norfolk-Southern Railroad Company, by its attorneys, R. N. Simms, answers as follows, to wit:

Answer.

NORTH CAROLINA,
Wake County:

In the Superior Court.

WALTER G. FEREBEE
v.
NORFOLK-SOUTHERN RAILROAD COMPANY.

The defendant, answering the plaintiff's complaint, says:

1. That as to the allegations of paragraph two of said complaint it admits that on the second day of June, 1912, the plaintiff was in the employ of the defendant as baggage master on one of the defendant's mixed trains which was being operated from
23 Raleigh, N. C., to Norfolk, Va., and that the said train left Raleigh, N. C., at 9:15 o'clock p. m., on the night of the second day of June, 1912, for Norfolk, Va., and that the plaintiff was upon said train as baggage master. Except as hereinbefore admitted all the allegations of said paragraph two of said complaint are denied.

2. That as to the allegations of paragraph three of said complaint, the defendant admits that the train hereinbefore referred to contained a locomotive engine and tender, one box car, two day coaches, and one Pullman car, and that the passenger car next to the baggage car on said train was constructed with a platform

on each end thereof, and that prior to the night of said second day of June, 1912, there were steps on either side of the said platforms, for the convenience and safety of passengers and employees in getting on and off said platforms which were about four feet from the ground. Except as hereinbefore admitted, all of the allegations of said paragraph three of said complaint are denied.

3. That the allegations of paragraph four of said complaint are denied.

4. That the allegations of paragraph five of said complaint are denied.

5. That as to the allegations of paragraph six of said complaint, the defendant admits that on the night alleged the plaintiff suffered some injuries, but says that he was not so seriously injured as alleged, nor in the manner, nor to the extent alleged. Except as herein admitted the allegations of said paragraph six are denied. The defendant expressly denies that the plaintiff has been damaged in any such enormous sum as he alleges.

6. That the allegations of paragraph seven of said complaint are denied.

And for a further defense to the plaintiff's alleged cause of action, the defendant alleges:

7. That such injuries as the plaintiff sustained were caused by his own negligence in that he negligently and carelessly attempted to go upon the steps of the car while the train was
24 in motion, and that he carelessly and negligently failed to keep a lookout as to where he was stepping, and walked in a careless and negligent way, and in that he carelessly and negligently failed to use his lantern, and in that he carelessly and negligently failed to discover and report to the defendant the absence of the steps, and in that he carelessly and negligently failed to hold to the railing and handholds beside the said steps and about the said platform and upon the end of said car which were in good order and condition and accessible to the plaintiff and which would have prevented his injury if he had used the same properly, and in that he did all of the aforesaid negligent acts while engaged in his own behalf and not in the interest or behalf or business of the defendant.

8. That, if the defendant was guilty of any negligence in connection with the occurrence of the plaintiff's injuries, which is denied, nevertheless, the plaintiff contributed to his injuries by his own negligence in that he negligently and carelessly attempted to go upon the steps of the car while the train was in motion, and in that he carelessly and negligently failed to keep a lookout as to where he was stepping, and walked in a careless and negligent way, and in that he carelessly and negligently failed to use his lantern, and in that he carelessly and negligently failed to discover and report to the defendant the absence of the steps, and in that he carelessly and negligently failed to hold to the railing and handholds beside the said steps and about the said platform and upon the end of said car, which were in good order and condition and accessible to plaintiff, and which would have prevented his

injury if he had used the same properly, and in that he did all of the aforesaid negligent acts while engaged in his own behalf and not in the interest or behalf or business of the defndant; and the said contributory negligence on the part of the plaintiff is hereby expressly pleaded in bar of any recovery by him in this action.

25 Without waiving any of its defenses as hereinbefore set out, but reiterating and relying upon each of them, this defendant further pleads that, if the defendant was guilty of any negligence in connection with the occurrence of the plaintiff's injuries, which is denied, nevertheless, the plaintiff contributed to his injuries by his own negligence in that he negligently and carelessly attempted to go upon the steps of the car while the train was in motion, and in that he carelessly and negligently failed to keep a lookout as to where he was stepping, and walked in a careless and negligent way, and in that he carelessly and negligently failed to use his lantern, and in that he carelessly and negligently failed to discover and report to the defendant the absence of the steps, and in that he carelessly and negligently failed to hold to the railing and handholds beside the said steps and about the said platform and upon the end of said car which were in good order and condition, and accessible to the plaintiff, and which would have prevented his injury if he had used the same properly, and in that he did all of the aforesaid negligent acts while engaged in his own behalf and not in the interest or behalf or business of the defendant; and if said contributory negligence on the part of the plaintiff does not bar him entirely of a recovery in this action, nevertheless, his damages should be diminished in proportion as the amount of negligence on his part contributed to his injury.

Wherefore, the defendant prays judgment that the prayer of the plaintiff be denied; that this defendant go hence without day and recover its costs, and have such other and further relief as may be proper.

R. N. SIMMS,
Attorney for Defendant.

STATE OF NORTH CAROLINA,
Wake County:

C. W. Upchurch, being duly sworn, deposes and says, that he is a local agent of the Norfolk-Southern Railroad Company upon whom summons might have been served in this action; and that the foregoing answer is true to his own knowledge, except

26 as to matters therein stated upon information and belief, and that as to those matters he believes it to be true.

C. W. UPCHURCH,
Agent N.-S. Ry.

Subscribed and sworn to before me, this 27th day of September, 1912.

[SEAL.]

A. T. SHAW,
Notary Public.

My commission expires the 13th day of July, 1914.

Therefore let a jury come by whom, etc.

Trial, etc.

And thereupon this action coming on for a trial at a term of the Superior Court begun and held for the county of Wake, at the courthouse in Raleigh, on the second Monday before the first Monday in March, 1913, and known as designated as the February Term, 1913, before the Honorable Frank Carter, Judge presiding, the following jurors, to wit, D. D. Goodwin, L. G. Riggsbee, K. D. Chamblee, R. T. Reddish, C. H. Collins, P. D. Gray, H. H. Sessoms, N. G. Justice, J. W. Jones, G. A. Broughton, W. W. Brinkley and J. H. Rogers, are chosen, tried, sworn and empaneled to try the issues joined between the parties.

At the close of the plaintiff's evidence the defendant, by its attorney, R. N. Simms, Esq., moves for judgment as of nonsuit under the Hinsdale Act. (Motion overruled, and defendant excepts.)

At the close of all the evidence the defendant renews its motion for judgment as of nonsuit under the Hinsdale Act. (Motion overruled, and defendant excepts.)

And thereupon, after argument of counsel and the charge of the Court, the jurors heretofore empaneled in this action for their verdict find the issues submitted to them as follows, to wit:

27 *Issues—Verdict.*

NORTH CAROLINA,
Wake County:

In the Superior Court.

WALTER G. FEREBEE
v.
NORFOLK-SOUTHERN RAILROAD COMPANY.

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer: Yes.

2. What is the whole amount of damages, if any, sustained by the plaintiff?

Answer: Fifteen thousand dollars.

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?

Answer: No.

4. What amount, if any, shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to the plaintiff's own negligence?

Answer:—

Motion to Set Aside Verdict and for a New Trial, etc.

Motion by defendant to set aside the verdict and for a new trial for errors alleged to have ocurred during the trial.
(Motion overruled; defendant excepts.)

And thereupon an order allowing Dr. M. L. Richardson expert fees as a witness in behalf of the plaintiff, is made and entered of record as follows, to wit:

Order.

NORTH CAROLINA,
Wake County:

In the Superior Court, February Term, 1913.

WALTER G. FEREBEE
v.
NORFOLK-SOUTHERN RAILROAD COMPANY.

Upon motion in the above entitled cause, it is ordered and adjudged by the Court that the witness for the plaintiff, Dr. M. L. Richardson, be, and he is hereby allowed a fee of $40
28 (forty dollars) as an expert witness for the plaintiff, to be taxed in the bill of costs herein.

FRANK CARTER,
Judge Presiding.

(To the above order the defendant objected and excepted.)

And thereupon judgment is rendered by the Court and entered of record and filed in this action in the words and figures as follows, to wit:

Judgment.

NORTH CAROLINA,
Wake County:

In the Superior Court, February Term, 1913.

WALTER G. FEREBEE
v.
NORFOLK-SOUTHERN RAILROAD COMPANY.

This cause coming on to be tried before his Honor, Frank Carter, Judge, and a jury, and being tried, the following issues were submitted to the jury:
1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. What is the whole amount of damages, if any, sustained by the plaintiff?

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?

4. What amount, if any, shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to the plaintiff's own negligence?

And the jury having answered the first issue "Yes," the second issue "Fifteen thousand dollars," the third issue "No," and not having answered the fourth issue, it is therefore,

Ordered, adjudged and decreed, that the plaintiff recover of the defendant, Norfolk-Southern Railroad Company, the sum of fifteen thousand dollars ($15,000) and the costs of this action, to be taxed by the clerk.

FRANK CARTER,
Judge Presiding.

29 *Appeal, etc.*

To the foregoing judgment the defendant again excepts, and in open court appeals to the Supreme Court; notice of appeal given in open court and further notice waived. Undertaking on appeal for costs fixed in the sum of $35. By consent, defendant allowed sixty days to file and serve statement of case on appeal, and the plaintiff is allowed sixty days thereafter to file and serve counter case or exceptions.

Supersedeas bond fixed in the sum of seventeen thousand dollars, and defendant is allowed thirty days to file supersedeas bond.

Bond of Defendant to Stay Execution.

(Filed March 10, 1913.)

STATE OF NORTH CAROLINA,
Wake County:

In the Superior Court.

W. G. FEREBEE, Plaintiff,
v.
NORFOLK-SOUTHERN RAILROAD COMPANY, Defendant.

Know all men by these presents, that we, Norfolk-Southern Railroad Company and National Surety Company, are held and firmly bound unto W. G. Ferebee in the just and full sum of $17,000, payment whereof well and truly to be paid, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, and we hereby waive the benefit of our homestead exemptions as to this obligation.

Sealed with our seals and dated this 8th day of March, 1913.

The condition of the above obligation is such that:

Whereas, in a certain action pending in the Superior Court of Wake County between W. G. Ferebee, plaintiff, and Norfolk-Southern Railroad Company, defendants, on the 28th day of February, 1913, the said plaintiff recovered judgment against the defendant in the sum of $15,000; and,

Whereas, said Court did make an order suspending the execution on the said judgment upon the defendant giving bond in the sum of $17,000, with condition according to law; and,

Whereas, it is the intention of the said Norfolk-Southern Railroad Company to appeal the judgment aforesaid:

Now, therefore, if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, if the said Norfolk-Southern Railroad Company will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages that shall be awarded against said Norfolk-Southern Railroad Company upon appeal, then the above obligation is to be void, otherwise to remain in full force and virtue.

NORFOLK-SOUTHERN RAILROAD COMPANY.
C. H. HIX, *President.*

[N.-S. Railroad Seal.]

Attest:
M. S. HAWKINS,
Secretary.

NATIONAL SURETY CO.
H. BARRON, *Resident Vice-President*

Attest:
A. B. CARR,
Resident Ass't Sec'y.

Transcript of Record for Supreme Court sent up.
December 2, 1913.

Certificate of opinion and judgment of the Supreme Court filed to the intent that a new trial be awarded as indicated in said opinion, etc.

Order Setting Case for Trial.

And thereupon at a Superior Court begun and held for the county of Wake at the courthouse in Raleigh, on the fourth Monday before the first Monday in March, A. D. 1914, before the Hon. C. M. Cooke, Judge, an order is made and entered of record in said action in the words and figures as follows, to wit:

31 NORTH CAROLINA,
Wake County:

In Superior Court, February Term, 1914.

W. G. FEREBEE
v.
NORFOLK SOUTHERN RAILROAD CO.

In the above entitled cause on motion of counsel for plaintiff, it is ordered that the said case be calendered for trial on Monday the 16th day of March, 1914, to be tried upon the conclusion of the trial of the case of Yellowday v. Perkinson.

C. M. COOKE,
Judge Presiding.

Second Trial, etc.

And now at a term of the Superior Court begun and held for the county of Wake at the courthouse in the city of Raleigh on the first Monday in March, A. D. 1914, before the Hon. C. M. Cooke, judge presiding, this action coming on for trial in pursuance of an order of the court heretofore made in the cause setting the same down for trial, the following jurors, to wit, W. R. O. Daniel, A. E. Allen, R. I. Smith, T. G. Ferrell, J. B. Spivey, Thomas Powers, A. T. Mial, T. O. Morris, Lonnie P. Thompson, J. L. Gill, W. R. Collins, and V. M. Mitchell being chosen, tried, sworn and empaneled to try the issues joined between the parties after argument of counsel and charge of the court the said jurors for their verdict find the issue submitted to them as follows, to wit:

Issue—Verdict.

NORTH CAROLINA,
Wake County:

In the Superior Court, March Term, 1914.

WALTER G. FEREBEE
v.
NORFOLK SOUTHERN RAILROAD COMPANY.

What amount of damages is the plaintiff entitled to recover of the defendant on account of its negligence?
Answer: Eighteen thousand dollars.

Motion to Set Aside Verdict, etc., etc.

Motion by defendant to set aside the verdict and for a new trial for errors alleged to have occurred during the trial in the
32 admission and exclusion of testimony and in the taking of evidence to be assigned, and for errors in refusing to give defendant's prayers for instructions, and in the charge as given and in the issue submitted. Motion refused. Exception by defendant. Motion by defendant to set aside the verdict as excessive. Motion refused. Exception by defendant. Motion by defendant for judgment non obstante veredicto. Motion refused. Exception by defendant. Motion by defendant for new trial for errors alleged to have occurred during the trial to be assigned. Motion refused. Exception by defendant.

And thereupon judgment is rendered by the court and entered of record and filed in this action in the words and figures as follows, to wit:

Judgment.

NORTH CAROLINA,
Wake County:

In the Superior Court, March Term, 1914.

WALTER G. FEREBEE
v.
NORFOLK-SOUTHERN RAILROAD COMPANY.

This cause coming on to be tried before his Honor, C. M. Cooke, judge, and a jury, at this the March Term, 1914, of the Superior Court of Wake County, and being tried upon the issue of damages in accordance with the opinion of the Supreme Court of North Carolina rendered in this cause at the August Term, 1913, of said court, the following issue was submitted to the jury:

"What amount of damages is the plaintiff entitled to recover on account of the negligence of the defendant."

And the jury having answered the said issue "eighteen thousand dollars ($18,000);" it is ordered, adjudged and decreed that the plaintiff, Walter G. Ferebee, recover of the defendant, Norfolk Southern Railroad Company, the sum of eighteen thousand dollars ($18,000) and the costs of this action, to be taxed by the clerk.

C. M. COOKE,
Judge Presiding.

33 *Appeal, etc.*

To the foregoing judgment the defendant again excepts and in open court appeals to the Supreme Court: Notice of appeal given in open court, and further notice waived. Undertaking on appeal

fixed at $50. Supersedeas bond fixed in the sum of twenty thousand dollars. By consent defendant allowed sixty days to serve case on appeal, and the plaintiff is allowed sixty days thereafter to serve counter case or exceptions.

Bond to stay execution filed March 25, 1914. Undertaking on appeal filed May 9, 1914, and sent herewith.

Bond to Stay Execution

(Filed March 25, 1914.)

NORTH CAROLINA,
Wake County:

In the Superior Court.

W. G. FEREBEE, Plaintiff,
v.
NORFOLK SOUTHERN RAILROAD COMPANY, Defendant.

Know all men by these presents, that we, the Norfolk Southern Railroad Company, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto W. G. Ferebee, in the just and full sum of twenty thousand dollars ($20,000) — the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, and we hereby waive the benefit of our homestead exemption, as to this obligation.

Sealed with our seals, and dated this 24th day of March, 1914.

The condition of the above obligation is such, that whereas in a certain action pending in the Superior Court of Wake County, North Carolina, between W. G. Ferebee, plaintiff, and the Norfolk Southern Railroad Company, defendant, on the 23d day of March, 1914, the said plaintiff recovered a judgment against the said defendant in the sum of eighteen thousand dollars ($18,-
34 000); and whereas, the said Court did make an order suspending execution upon the defendant, giving bond in the sum of twenty thousand dollars, with condition according to law; and, whereas, it is the intention of the Norfolk Southern Railroad Company to appeal the judgment aforesaid; now, therefore, if the said judgment appealed from, or any part thereof be affirmed, or the appeal be dismissed, if the Norfolk Southern Railroad Company will pay the amount directed to be paid by the judgment, or the part of such amount, as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages that shall be awarded against the said Norfolk Southern Railroad Company upon appeal,

then the above obligation is to be void; otherwise to remain in full force and virtue.

NORFOLK SOUTHERN RAILROAD COMPANY,
By C. H. HIX, *President.* [SEAL.]

Attest:
M. S. HAWKINS,
Secretary.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By A. M. MAUPIN & CO., *Ag'ts.* [SEAL.]
WM. B. JONES, *Attorney.*

Approved: May 25, 1914.

MILLARD MIAL, *C. S. C.*

Statement of Case on Appeal.

NORTH CAROLINA,
Wake County:

In the Superior Court, March Term, 1914.

WALTER G. FEREBEE
v.
NORFOLK SOUTHERN RAILROAD COMPANY.

This was a civil action brought by the plaintiff to recover damages for personal injuries alleged to have been sustained by the plaintiff while employed by the defendant. The action was tried at the February, 1913, term of the Superior Court of Wake County, North Carolina, and from the judgment then rendered an appeal was taken by the defendant to the Supreme Court of North
35 Carolina. At the August Term, 1913, of the said Supreme Court a partial new trial was ordered. The action was again tried at March Term, 1914, of the Superior Court of Wake County, North Carolina. The pleadings which appear in the record show the contentions of the parties. The defendant in apt time tendered the following issues, to wit:

1. Was the plaintiff injured by negligence of the defendant as alleged in the complaint?

Answer:

2. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

Answer:

3. How much is the whole amount of damages if any sustained by the plaintiff?

Answer: $——

4. What amount shall be deducted from the damages sustained

by the plaintiff as the proportion thereof attributable to plaintiff's own negligence?

Answer:

The court refused to submit the said issues as tendered by the defendant, and the defendant excepted, and likewise excepted to the refusal of the court to submit each of said issues, and this was the defendant's first exception.

First exception.

The court submitted the following issue, to wit:

"What amount of damages is the plaintiff entitled to recover of the defendant on account of its negligence?"

The defendant in apt time objected and excepted to the settlement of this as the issue to be tried and to the submission of this issue by the court, and this constitutes the defendant's second exception.

Second exception.

36 Exception 3. Dr. M. L. Richardson testified after having qualified as an expert, that he had treated the defendant for about four months directly after his injuries. That he found that the defendant was suffering from two spinal injuries, one in the upper and one in the lower part of his spine. That the plaintiff was injured in such a way that the ligaments and muscles evidenced of having been bruised, and the spine had been bent in somewhat an abnormal position. That he had examined the defendant on yesterday, that his spine had gotten worse since the first examination, and that there were signs of developing spinal curvature and that his condition indicated the development sooner or later. The plaintiff was then stripped to the waist, stood before the jury, and Dr. Richardson proceeded with his testimony, demonstrating the condition of the plaintiff. "The first injury I spoke of was the one in the neck. The spine was affected at the 4th, 5th and 6th vertebrae. You can see how the man carries his head. That, in my opinion, is caused by the fact, that the spine and neck here (indicated) is not capable of moving in certain directions, and it is impossible for him to move them on account of the formation of tissues around those bonds holding it in an abnormal position. The other injury was in the spine about the waist line. The injury is not so apparent as the injury here. You can, as I draw my hand down here, see there (indicating). If you will follow the line of this spine here (indicating), you will notice also that there is a slight curvature, slightly to the right of this lower part here, and slightly to the left here. (Slightly in an S curve; the break in the "S" at the point of the pack here. This I speak of here was not present when I made the first examination in October, 1912, but has gradually developed within the last four months, and apparently, seems to me, due to the fact that these muscles on one side are lessening their power of holding the spine, and it is giving way to the muscles on the other side. Notice also that this point the ribs on this side are bulging. They bulge more than they do on this side.

That is caused by the spine crowding over and pushing the
37 ribs that way. Of course, these ribs follow the spine with a corresponding depression. (This place up here (indicating) the neck, is the most serious injury of the two, and apparently has been produced by some force.)

Objection by defendant to witness testifying to anything outside of his own knowledge. Objection overruled. The objection was to statement in parenthesis. The witness had not seen the occurrence of the injury. Exception by defendant.

Third exception.

Exception 4. The witness proceeded to testify "coming from a point above this place of injury, carrying the head and the upper part of the spine forward. I state that for the reason that the neck here (indicating).

Objection by defendant to witness testifying to matters about which he knows nothing *to* his own knowledge. Objection overruled, and exception by defendant.

Fourth exception.

The witness proceeds to testify "my reason for stating that the conditions of this kind may be brought about by two causes one of them is accidents or injuries in which force produces them, and the other is diseased conditions. Diseased conditions of the spine will frequently, and often do, produce deformities which resemble these in some particulars.

During the direct examination of the plaintiff, the following questions were asked him by his counsel and the following answers given, to wit:

Q. What were you getting a month, what did you get a month at that time?

A. It was $84 or $87, I don't remember which. Captain Andrews' record will show in the paymaster's office.

Q. The best you can remember?

A. $84 or $87.

Q. What had been your wages, were they on the increase
38 or not?

A. Yes, when I was braking I got from $40 to $48, after I went to flagging I got $55 to $60.

Q. How long did you get as much as $80.

A. I had been in line for the extra baggage two or three months.

Objection by defendant to this question and answer, and same withdrawn by plaintiff. Exception by defendant.

Exception No. 5. Q. How long had you been getting $80 per month?

A. Two or three months.

The foregoing occurred in the hearing of the jury, but his Honor did not charge the jury they should not consider this evidence, and this was the defendant's fifth exception.

Fifth exception.

On the cross-examination of the plaintiff he was asked the question: "Before you reached Wendell, you weren't in the baggage car, were you?"

Objection by the plaintiff on the ground that the question of contributory negligence had already been settled. Objection sustained; exception by defendant; and this was the defendant's sixth exception.

Sixth exception.

On cross-examination the defendant offered to ask the plaintiff the following question: "Mr. Ferebee, you testified, didn't you, that the rules under which you were operating prescribed that the place of baggage master when on duty was in the baggage car?"

Objection by plaintiff to this question upon the ground above mentioned.

Thereupon the defendant's counsel stated to the court: "It is my purpose to show that while this man was supposed to be on duty he was careless and negligent and had left the place where he was appointed to be; and that as bearing upon the value of his services. The question now is as to what is the grade of his capacity. It is a matter of common knowledge that the greater number of employees the greater the necessity for the qualities of obedience,
39 faithfulness, and loyalty to duty. The whole question goes to the earning capacity of this employee. It is my purpose to go further and show that the plaintiff was a careless employee. He cannot have a careless quality on other occasions and rid himself of it on this occasion. I certainly cannot be confined to the proof that this man was careless upon other occasions, and not be permitted to show as a further item of my proof that on this very occasion he still maintained those careless habits of life. The purpose of this question is to elicit from the plaintiff his admission that he knew, that the rules of the defendant company in effect at the time of his injury prescribed that his place while on duty as baggagemaster was in the baggage car; and it is our purpose further to show that in violation of this known duty on his part he was immediately before his injury out of his place of duty, out of the baggage car, and sitting in a passenger coach with a gentleman who was smoking a cigarette, and the same is offered as bearing upon the capability of the plaintiff as a railroad employee and as bearing upon the value of his services as an employee and is directed solely to the issue of damages and requested to be considered only as bearing upon the quality of the plaintiff's earning capacity as entering into the question of the damages sustained by him on account of the injury described in the complaint.

The plaintiff's objection was sustained, and the defendant excepted. This was the defendant's seventh exception.

Seventh exception.

At this period counsel for the plaintiff withdrew the objection to the two foregoing questions, and the witness proceeded to say, "there are written rules, but orders supersede rules."

Being further examined by defendant the witness testifies: "I was not in the baggage car some time before I approached the station at Wendell. I was at my post in the colored coach next to the baggage car sitting on the seat directly in front of the door talk-

ing with Captain Foster, the Pullman conductor. My place
40 was where I was ordered. I had directions from the conductor. I was not smoking, I have never smoked a cigarette on duty in my life. When the train approached Wendell and walked in the usual way, got my lantern. I don't remember anything about getting my lunch basket. I don't know whether I had it or not. I do not think I had it. Sometimes I got my lunch there fixed when I got to Wendell, and sometimes I put it off there. I don't know whether the lunch basket was found on the ground by me or not. I had my lantern in my left hand. I did not have the lantern on my arm. I didn't catch hold with my left hand. This was a railroad lantern. I did not make any express examination to see whether there were any steps there or not before I stepped. By holding the lantern down beneath the platform and examining them like a car inspector by the aid of the lantern, I could have seen that the steps were lost. It was a dark night and I could not have seen from the platform whether the steps were there or not. The purpose of the lantern is to give signals. It gives a better light at a distance, far away, than close to you. By making an examination I could have seen with that lantern that the steps were gone. I did not make any examination."

The plaintiff testified on his direct examination that he was injured by stepping from the front platform of a passenger coach just in the rear of the baggage car at night by reason of the fact that the steps had been knocked off at the side of the said platform. There was evidence that these steps had been on the train and used when it left the station at Raleigh, less than an hour before. The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the steps were, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no such examination to see whether they were there, and that he was at the time both a baggagemaster and flagman.

41 On cross-examination he was asked if the rules of the defendant company in force and effect at the time of the injury did not require him as a flagman to make such an examination and see for himself whether the steps were in good condition before using the steps or attempting to use them. There was objection by the plaintiff.

Defendant's counsel stated to the court: It is the purpose of the defendant in asking this question to show that the rules of the defendant company in effect at the time complained of, and known to the plaintiff, prescribed and required that the plaintiff, being engaged as a flagman as well as a baggage master, must examine and know for himself that the steps were in proper condition before using them. It is our further purpose in this regard to show this as evidence bearing upon the plaintiff's capability as an employee, tending to show his disobedience and nonobservance of the rules of his employer, known to him at the time, and is requested to be admitted and considered only as bearing upon the issue of damages.

The plaintiff's objection was sustained, and the defendant excepted; and this was the defendant's eighth exception.

The plaintiff's attorney objected on the ground that this was not the best evidence but that the printed rules were.

Eighth exception.

Dr. C. E. Moore, a witness for the defendant, an expert physician and surgeon, the proprietor of a sanitorium at Wilson, N. C., and who performed the first surgical operations upon the plaintiff, after his injury complained of, and who was not in anywise connected with the defendant company, testified on redirect examination: "That he had seen the plaintiff, Ferebee, a few times around the hotel when witness thought he was not quite as careful in guarding himself as he was here." Upon recross-examination by counsel for plaintiff, the witness testified as follows: "I would not say absolutely that Mr. Ferebee is faking now. I believe a part of
42 it is faking. I believe that time will demonstrate that he is faking. I have not examined him. I do not know, of course, I do not."

Counsel for the plaintiff then asked the witness the following question: "Do you want to leave this jury under the impression that he is faking?"

Objection by the defendant; objection overruled; exception by defendant.

Ninth exception.

The witness then proceeded to testify as follows: "I do not say that he is faking entirely, but I say I believe so from observation, around at different places. I saw him relaxing. I mean to say that he is faking because I have seen him relaxing and because I have seen him relax two or three times. That is the only reason. I do not want to examine his neck or his spine."

The witness was required to answer and did answer: "I did not say that he is faking entirely." And upon further inquiry as to whether he meant to say to the jury that he was faking partially, he answered: "I say, I believe so."

Dr. R. S. Spillman, a witness for the plaintiff among other things, testified as follows: "The cause of the continued pain in his arm (referring to the plaintiff) can be accounted for. Whenever a limb is amputated it does not make any difference how many times (you may cut it off a dozen times) each time the tip end of the nerve is very often picked up in the scar tissue. Scar tissue has a general tendency to contract and you get a little bit of fine fibre nerve in that, and it is constantly pressing and grinding on it, and it gives you a steady and continual pain pretty nearly all the time."

The counsel for the plaintiff then asked the witness the following question: "What in your opinion is the effect of this pain if any, upon the general nervous system of the man?" The witness answered, "He gets nervous, can't sleep, and can't eat and begins to go to pieces all over."

43 Defendant objected to the question. Objection overruled, and exception by defendant.

Tenth exception.

On the examination of Dr. Graves, a surgeon and witness for the plaintiff, he was permitted over the objection of the defendant to testify: "Upon examination I found Mr. Ferebee run down and weak, with a rather troubled expression, both indicating sorrow and suffering."

Exception by defendant, and this was defendant's eleventh exception.

Eleventh exception.

A witness for the plaintiff, Dr. Glascock, having made an examination of the plaintiff in the presence of the jury, testified that the demeanor of the plaintiff while under such examination demonstrated that he has no sensation in a part of his injured arm. The defendant upon the examination of Dr. R. L. Payne, who was admitted to be an expert physician and surgeon, under the objection and exception of the plaintiff, testified as follows: "There are improved methods in general use in the medical profession for the purpose of examining and demonstrating the sensations or lack of sensations in the patient. The method used by Dr. Glascock (an expert witness and physician who had examined the plaintiff, Ferebee, and demonstrated his condition before the jury) was not made according to the approved method for this reason. If you will go to test the sensation of a patient, you must do so when he does not know what you are attempting. He must be blindfolded or his eyes closed so he will not see the approach of the pricking needle. You test whether he does or does not feel when he does not know. Dr. Glascock let the patient know and then asked him whether he did or did not feel, and whether this hurt or did not hurt."

Counsel for the defendant then asked the witness the following questions: "State whether or not a person could pass through
44 an examination such as Dr. Glascock exhibited in the manner the plaintiff did and yet have sensation from the parts examined?"

Objection by the plaintiff; objection sustained, exception by the defendant.

Twelfth exception.

O. J. Sawyer, a witness for the defendant, among other things, testified: "I have known the plaintiff, Walter G. Ferebee about 16 years. I knew about his ability as a railroad man in the motive power department. He is a poor man; he could not hold down a job firing a switch engine."

The plaintiff Ferebee was asked the following question by his counsel: "You heard Mr. Sawyer's testimony yesterday about your beginning to fire, and that you could not hold down a job?" Answer: "No, I could not. No man could hold a job under him with the method he undertook to make me get out."

Q. How did he get you out, were you discharged?"

A. "No, I resigned after seeing how he felt toward me?"

Q. "Did he have any feeling toward you?"

A. "I believe that he did."

To the last question and answer the defendant objected; objection overruled, exception by defendant.

Thirteenth exception.

The witness was then permitted to testify as follows, without further objection: "I was sent down there by the superintendent of motive power to go to work, and they had this man transferred as helper or hostler, and he asked me why in the hell I went down to take a fellow's job, and I said, "I didn't go down to take a fellow's job. I was an inexperienced man and not used to the work, and he has to go down on Sunday to bank the fires, and he kept having so much to say about having to go down there on Sunday, and raising cain, so I was advised to resign, and that is the reason I did resign."

45 On redirect examination plaintiff was asked the following question: "Please state to the jury if you have seen the two lady nurses who took care of you in part in St. Vincent's Hospital here?" The witness answers, "Yes, I have seen the two night nurses here."

Objection by defendant to this question and answer; objection overruled, and exception by defendant.

Fourteenth exception.

The plaintiff then, without objection, offered in evidence the subpoenas issued by the defendant for these two nurses.

The defendant in apt time and in due form requested that the following instruction be given the jury, to wit:

"The plaintiff's right to recover in this action is based upon the Act of Congress known as the Federal Employers' Liability Act, and under the terms of that act the conduct of the plaintiff cannot be considered as a defense to the action to the extent of destroying the plaintiff's right to recover, but in arriving at the amount of damages you can consider the plaintiff's conduct and the extent to which the injury complained of was brought about by such conduct and if you find by the greater weight of the evidence that the plaintiff failed to look before attempting to alight from the train at Wendell, and that by looking he could have seen that the steps were missing, and could have avoided falling under the cars, it is your duty to consider such facts in arriving at your answer to the issue submitted to you."

His Honor refused to give this instruction to the jury, and the defendant excepted; and this is the defendant's fifteenth exception.

Fifteenth exception.

The defendant in apt time and in due form requested that the jury be given the following instruction, towit:

"Under the Federal Employer's Liability Act the conduct of the plaintiff is to be considered by the jury in determining the

45½a amount of damages, and in answering the issue in this case you can consider the conduct of the plaintiff, Walter G. Ferebee, at the time of his injury in reduction of the damages, which you find he has sustained."

His Honor refused to give this instruction to the jury, and the defendant excepted; and this is the defendant's sixteenth exception.

Sixteenth exception.

The defendant in apt time and in due form requested that the jury be given the following instructions, to wit:

"You should not consider that the defendant is a corporation or that it may be able to pay damage. The ability of the defendant to pay damages is a matter which can not properly be considered by you in answering the issue."

His Honor modified this request and gave it by inserting the word "large" before the word "damage" in both places where the same occurs in this prayer.

The defendant excepted to his Honor's so doing; and this was the defendant's seventeenth exception.

Seventeenth exception.

The defendant in apt time and in due form requested that the following instructions be given to the jury, to wit:

"In considering the testimony of the medical experts who testified for the plaintiff, you may take into consideration the fact, if you find it to be a fact from the evidence, that they are naturally inclined to view the circumstances that make the plaintiff's side in a favorable light and contrary circumstances in an unfavorable light. You should consider their attitude, demeanor, conduct and manner of answering questions, and the intelligence with which the questions were answered, in making up your mind as to whether you believe the testimony."

46 His Honor refused to give this instruction to the jury, and the defendant excepted, and this is the defendant's eighteenth exception.

Eighteenth exception.

The defendant in apt time and in due form requested that the following instruction be given to the jury, to wit:

"I charge you that you cannot give the plaintiff such sum as you feel you would charge to go through the experience which he has gone through. You have no right to give him such sum as you may feel that you would charge for being in the condition in which he claims he is. You should give reasonable, fair and just compensation for the injury which he has received, and no more."

His Honor refused to give this instruction except in modified form as it appears in the charge, and the defendant excepted, and this is the defendant's nineteenth exception.

Nineteenth exception.

The defendant in apt time and in due form requested that the following instructions be given to the jury, to wit:

"The plaintiff, Walter G. Ferebee, as a party to this action has an interest in the outcome of such a character that it is your duty to scrutinize his evidence with care and to give due consideration to the fact that he is interested."

His Honor refused to give this instruction as requested but added thereto the following: "That is the extent of your consideration, and I do this because the Supreme Court has held that it must be done, but after you have done so, and you shall conclude that he told the truth, you will give the same weight to his evidence that

you would to that of any other credible witness," and the defendant excepted, and this is the defendant's twentieth exception.

Twentieth exception.

47 The court's entire charge to the jury is hereinafter set forth.

His Honor, among other things, charged the jury as follows, to wit:

"The defendant, by its answer, sets out contributory negligence by the plaintiff. At a former term of this Court the issues as to negligence and contributory negligence were settled entirely. This issue was also settled at that trial, but this question we have up now has been sent back by the Supreme Court for a new trial, and that is the issue as to the quantity of damages."

The defendant excepted to this portion of his Honor's charge; and this is the defendant's twenty-first exception.

Twenty-first exception.

His Honor, among other things, charged the jury as follows, to wit:

"Upon the finding of the two first issues, the plaintiff became entitled, as a matter of law, to recover some damages, if only nominal, but upon the verdict upon the third issue as to damages, it became necessary, before there could be a final disposition of the case, there should be this trial, going through all the formalities on this one issue as we did on the others with respect to the method of trial, and the difference is only the issue, which I shall read to you now, which I submit for your consideration and determination, with such instructions as the court may submit to you."

The defendant excepted to this portion of his Honor's charge; and this constituted the defendant's twenty-second exception.

Twenty-second exception.

His Honor, among other things, charged the jury as follows, to wit:

"The rule for ascertainment of damages where the plaintiff has been injured by the negligent conduct of the defendant is that he is entitled to recover damages for past and prospective loss

48 resulting from the defendant's wrongful act, and this may embrace indemnity for actual expenses, nursing, medical attention, and loss of time and disability to work and capacity to earn money, and where, as in this case, it is alleged that there is a permanent disability, and so found by the jury, there should be this element of damage; that is, a compensation for permanent disability, and that is to be determined by the jury."

The evidence of any actual expense by the plaintiff was as follows:

The plaintiff testified that he has actually paid out between $250 and $275 for medical assistance and medicines on account of his injury. The plaintiff further testified, "I paid a boy to push me around the hospital, and I followed Dr. Payne and I asked him with tears in my eyes for God's sake to do something for my back, and he said, "the back would take care of itself."

The defendant excepted to this portion of his Honor's charge; and this is the defendant's twenty-third exception.

Twenty-third Exception.

His Honor, among other things, charged the jury as follows, to wit:

"While the two first issues settled the question of negligence and contributory negligence and entitled the plaintiff to recover, but when they come to introduce evidence as to the damages they are not confined to the same damages, specific evidence of damage, as they were before."

The defendant excepted to this portion of his Honor's charge; and this is the defendant's twenty-fourth exception.

Twenty-fourth Exception.

His Honor, among other things, charged the jury as follows, to wit:

"So that by their evidence the plaintiff alleges and contends that he is damaged in several respects beside his disability to labor."

49 The defendant excepted to this portion of his Honor's charge (but no objection was made to this language during the progress of the trial); and this constitutes defendant's twenty-fifth exception.

Twenty-fifth Exception.

His Honor, among other things, charged the jury as follows, to wit:

"The jury is instructed that they will not give any consideration to the issue of negligence or to the issue of contributory negligence. They are instructed by the court that these two issue are behind us."

The defendant excepted to this portion of his Honor's charge; and this constitutes the defendant's twenty-sixth exception.

Twenty-sixth Exception.

His Honor, among other things, charged the jury as follows, to wit:

"The plaintiff contends further that his whole nervous system has been and is now shattered and that he cannot control himself in any way."

There was no evidence that the plaintiff's whole nervous system was shattered, or that he could not control himself in any way; except as follows:

"I am up and down all night long. Go to bed anywhere from 8:00 to 4:00 o'clock in the morning. Up anywhere from three to six times a night, first on the couch, then walking around the different parts of the house trying to reach anything that will quiet me. Go back to bed and find it practically the same thing over again. Every part of my body trembles continuously, nervousness. I can't get control of myself in any part of my body. Anything like excitement brings it on more."

50 And the defendant excepted to the above quoted portion of his Honor's charge; and this constituted defendant's twenty-seventh exception.

Twenty-seventh Exception.

His Honor, among other things, charged the jury as follows, to wit:

"The plaintiff contends further that a large quantity of cinders and dirt got into and under the skin and scalp, and that when it was sewed up on the night of the injury a large quantity of dirt and cinders were sewed under the skin. He further contends with respect to the amputation of his left arm that it was done in such a way that it soon became extremely painful, and that he had to have a second operation performed, and that he had to have a part of the stock again amputated so that there might be a cushion of flesh over the end of the stump."

The defendant excepted to this portion of his Honor's charge, and this constitutes defendant's twenty-eighth exception.

Twenty-eighth Exception.

This was a stated contention and no objection was made thereto during the progress of the trial. The plaintiff, among other things, had testified as follows: "I was picked up and set on the steps of the station at Wendell and I regained myself a little and saw my hand, and that I was chewing my hair and scalp. My hair, blood and gravel was in my mouth." Dr. Graves operated on me, opened up my head and removed some portion of scalp and some foreign substance."

Dr. R. S. Spillman, a witness for the plaintiff, had testified among other things, as follows:

"When I examined him (plaintiff), I found he was minus a hand, most of his scalp had been knocked off, and there were quite a number of sinuses—that is, open wounds—discharging pus on top of the head three or four of them. The whole of the top of his head seemed to be infected. These openings I enlarged so I could
51 get under the scalp, and curet-ed and cleaned out. I got a lot of pus, cinders, broken down tissue in keeping the wound open so as to get out any foreign body so long as there was any infection. On two or three occasions I had to scrape out."

The plaintiff, Ferebee, testified after Dr. Grraves operated on him, "I found that he had opened my head and the stock of this arm and had taken off a portion of the bone. There was a great deal of difference as to that. Before it was like a cloth pulled over the end of that table, it would be drawn, and after Dr. Graves cut it off, there was a cushion. Prior to that time was no evidence of any flesh over the end of the stock at all. No stock at all. Prior to that time there was no cushion. Continuous pain all the time.

His Honor, among other things, charged the jury as follows:

"The court further charges you that in this case the plaintiff is entitled to recover as damages one compensation for all of his injuries he has sustained, past and prospective, in consequence of the defendant's wrongful and negligent acts, and the damages awarded are understood to embrace indemnity for actual nursing and medical expenses and loss of time, loss from inability to perform ordinary labor, or capacity to earn money. The plaintiff is to have a reasonable satisfaction for the loss of both bodily and mental powers, for actual suffering both of mind and body, which are the immediate and necessary consequences of the injury."

There was no evidence that the plaintiff had paid anything as

nursing expenses, except as hereinbefore stated in this statement of case on appeal. There was no evidence that the plaintiff had lost any mental powers.

Dr. Graves, a witness for the plaintiff, testified:

"There is a great deal of difference in plaintiff's condition now and prior to the accident. He is in very much worse condition than he was prior to the accident. I find him on cross-examination today still mentally dull."

52 The defendant excepted to the above quoted portion of his Honor's charge; and this constituted defendant's twenty-ninth exception.

Twenty-ninth Exception.

There was a verdict as appears in the record.

The defendant moved to set the verdict aside. Motion overruled. Exception by defendant, and this constituted defendant's thirtieth exception.

Thirtieth Exception.

The defendant moved for a new trial for errors, committed during the trial in the admission and exclusion of evidence, and in the taking of evidence, and in the Court's charge to the jury, and in the refusal of the court to give the defendant's prayers for special instructions, and in the issue submitted, and in the issues refused.

Motion overruled; defendant excepted, and this constitutes defendant's thirty-first exception.

Thirty-first Exception.

The defendant moved to set the verdict aside as being excessive. Motion refused; defendant excepted, and this constitutes the defendant's thirty-second exception.

Thirty-second Exception.

Defendant moved for judgment non obstante veredicto. Motion refused; exception by defendant; and this constituted the defendant's thirty-third exception.

Thirty-third Exception.

The court entered judgment as appears in the record. The defendant excepted, and this constituted defendant's thirty-fourth exception.

Thirty-fourth Exception.

53 The defendant in open court appealed to the Supreme Court and gave notice of this appeal in open court, and further notice was waived by the plaintiff. Undertaking on appeal was fixed at fifty dollars ($50). The supersedeas bond was fixed in the sum of twenty thousand dollars ($20,000.00).

By consent, the defendant was allowed sixty days from the last day of this term of court in which to prepare and serve statement of case on appeal; and the plaintiff was allowed sixty days thereafter in which to serve counter-case or exceptions.

Charge to Jury.

The following is the entire charge of the judge to the jury, to wit:

"Gentlemen of the Jury: This is an action brought by Walter G. Ferebee against the Norfolk Southern Railroad Company for the purpose of recovering damages against the defendant, which he alleges, *for damages which he alleges* he sustained on account of the negligence of the defendant.

"The defendant by its answer set out contributory negligence by the plaintiff. At a former term of this court the issues as to the negligence and contributory negligence were settled entirely. This issue was also settled at that trial, but this question we have up now has been sent back by the Supreme Court for a new trial, and that is the issue as to the quantity of damages.

"Upon the finding of the two first issues, the plaintiff became entitled, as a matter of law, to recover some damages, if only nominal, but upon the verdict upon the third issue as to damages it became necessary, before there could be a final disposition of the case, there should be this trial, going through all the formalities on this one issue as we did on the others with respect to the method of trial, and the differences is only the issue, which I shall read to you
54 now, which I submit for your consideration and determination, with such instructions as the court may submit to you.

"What amount of damages is the plaintiff entitled to recover of the defendant on account of its negligence?

"The rule for ascertainment of damages where the plaintiff has been injured by the negligent conduct of the defendant is that he is entitled to recover damages for past and prospective loss resulting from the defendant's wrongful act, and this may embrace indemnity for actual expenses, nursing, medical attention, and loss of time and disability to work and capacity to earn money and where, as in this case, it is alleged that there is a permanent disability, and so found by the jury, there should be this element of damage; that is, a compensation for permanent disability, and that is to be determined by the jury.

"You have heard the evidence in this cause in respect to what the permanent damages were. While the two first issues settled the question of negligence and contributory negligence and entitled the plaintiff to recover, but when they come to introduce evidence as to the damages they are not confined to the same damages, specific elements of damage, as they were before. So they by their evidence the plaintiff alleges and contends that he is damaged in several respects beside his disability to labor. He states that he is permanently disabled with respect to his head and in respect to his hearing, in respect to his movements, by an injury which has been done to his spinal column. All of these elements of damages should be considered together, but the measure of damages is the extent of his loss by reason of his partial disability to work up to this time and during the time he was totally disabled to work, and after now, if the jury shall find that the permanent disability will continue, and

for how long it will continue; the measure of damages will be the loss that will inure to him on account of these disadvantages, and the Supreme Court has said in one place where there is a marked blemish to his form that you may take that into consideration.
55 That is in respect to his looks. In addition to that, there is another element of damages which you shall allow, and that is whatever you shall find to be the compensation, the reasonable compensation for the suffering and pain which came to him as a certain and direct result of the defendant's negligence. They are the elements of damage. I have given you all the instructions I care to give you.

"These are the plaintiff's contentions. This action was brought by the plaintiff for the purpose of recovering damages against the defendant which he alleges that he sustained on account of the negligence of the defendant. The defendant filed its answer, setting out contributory negligence. The plaintiff alleges and now contends that he was damaged in a great amount, as much as $75,000. The defendant alleges and contends that he was not damaged to so great an extent. At a former trial of this case at a former term of this court, the issues fixing the liability of the defendant were determined by a jury, the jury having answered that the plaintiff was injured by the negligence of the defendant, and that the plaintiff was not guilty of contributory negligence; that is, that he did not by his own negligence contribute to his injury.

"The only question now left to determine is, what amount of damages is he entitled to recover of the defendant on account of the negligence of the defendant?

"The jury is instructed that they will not give any consideration to the issue of negligence or to the issue of contributory negligence. They are instructed by the Court that these two issues are behind us.

"You will now give your attention to the amount of damages the plaintiff is entitled to recover on account of the negligence of the defendant as aforesaid.

"The plaintiff contends that he has sustained large damages. He argues to you through his counsel that he has suffered intensely, and that his damages can not be accurately measured in dollars
56 and cents, but insists that you will exercise your best judgment as to justice between him and the defendant. The plaintiff insists that you ought to award as much as $75,000. He claims that in his complaint. He claims that he has been injured in his spine, that it is distorted, misshapen, and out of line; that it will never, as he insists, be permanently cured, and that he now endures severe pain constantly on account of the spinal trouble. He insists that he is entirely deaf in his left ear, that he can not hear the slightest thing with the ear, that he is put to great inconvenience by reason thereof, that by reason thereof he will not be able to get employment in many industrial places, and that he would not be of any use in the railroad service any more. He contends further that he is disfigured on the top of his head, that there are lines thereon that will show distinctly and will always show.

"He contends further that he has lost one arm; that he has not

only lost the arm, but that the stump which is left is greatly reduced in size and, practically speaking, is of no use to him, and is a source of great discomfort and pain.

"He further contends that he has lost his power of speech to some extent, and that he can not articulate as easily as he could before he was injured.

"He further contends that his right arm and hand is more or less disabled, that he has not the grip nor the grasp in it that he formerly had. He contends further that his whole nervous system has been and is now shattered and that he can not control himself in any way. That he suffers intensely all the time, and that he has severely suffered ever since the injury that took place on the second day of June, 1912. That he suffered intensely and almost indescribably at the time and subsequent to the injury referred to. He contends that his scalp was torn open, and that the forepart of it hung down over his eyes, and that a part of it actually got in his mouth and he found himself chewing it in the most horrible manner possible. He contends further that a large quantity of
57 cinders and dirt got into and under the skin and scalp, and that when it was sewed upon on the night of the injury a large quantity of dirt and cinders were sewed under the skin. He further contends with respect to the amputation of his left arm that it was done in such a way that it soon became extremely painful, and that he had to have a second operation performed, and that he had to have a part of the stock again amputated so that there might be a cushion of flesh over the end of the stump. He contends that these operations were extremely painful, and that he has suffered indescribably, and he contends further that the injury is permanent, and he argues to you that as long as he lives he will suffer severe pain and discomfort. He contends that this was brought about by the negligence of the defendant. I believe I have said that before, gentlemen.

"He further contends that he has paid $250.00 for medical and nursing bills, and that he has actually expended this sum of money. This was introduced in evidence, I believe, gentlemen.

"He further contends that the defendant admits in its answer that the plaintiff sustained some injury, but denies any such injury as the plaintiff alleges, and it insists that his injury is not permanent except the loss of his arm and the scars on the top of his head, and insists after a time the pain which the plaintiff endures will gradually cease and he will gradually become able to work and earn a living, and it further insists that his damages should be nothing like as much as the plaintiff claims, and insists that you ought to award him only a small amount.

"The Court charges you that the burden is on the plaintiff to prove to you by the greater weight of the evidence what damages he has sustained. The Court further charges you that in this case the plaintiff is entitled to recover as damages one compensation for all of his injuries he has sustained, past and prospective, in consequence of the defendant's wrongful and negligent acts, and the

damages awarded are understood to embrace indemnity for
58 actual nursing and medical expenses and loss of time, loss from inability to perform ordinary labor, or capacity to earn money. The plaintiff is to have a reasonable satisfaction for the loss of both bodily and mental powers, for actual suffering both of mind and body, which are the immediate and necessary consequences of the injury.

"Now, gentlemen of the jury, the defendant asks that I charge you that there is no allegation of improper treatment at the hospital or of negligence in the performance of the operation in amputating the plaintiff's arm, or in the treatment of the scalp wounds in the hospital at Wilson, and if there has been offered any evidence of improper treatment or negligence in the amputation of the plaintiff's arm, you can not consider such evidence in answering the issue submitted to you in this case. I believe there is none, and if there is none, of course you will not consider it.

"Now, gentlemen (addressing counsel for defendant), your second request is refused on account of the fact that previously a jury has found that there was no contributory negligence. I also refuse your third request, gentlemen, for the reason that the issue of contributory negligence has been found in favor of the plaintiff.

"To continue, gentlemen of the jury, you can not allow the plaintiff large damages simply because he asks for large damages in the complaint. In your consideration of the damages you will not take into consideration the prayer in the complaint, but you should be governed entirely by the evidence, and by the extent you may find from the greater weight of the evidence that the plaintiff has actually been injured.

"In considering the question of damages, you should allow the plaintiff reasonable, fair and just compensation and nothing more for any pain suffered, or pain and suffering he may have sustained as a direct result of the injury, and you shall allow a fair and reasonable amount for loss of time from work on account of the injury and doctor's bills he may have paid.

59 "The plaintiff further contends that he is permanently injured and his earning capacity has been diminished. The defendant contends that this is only temporary, and that he has grown better since the injury and that he will continue to grow better. That is given as the contention.

"The burden is upon the plaintiff to show you by the greater weight of the evidence that he has been permanently injured, and that his earning capacity has been decreased, before he can recover damages from such causes. That is given to you as an instruction.

"If you find that the plaintiff can perform other service in other lines of work, which would bring him as much net income as flagging, then he would not be entitled to damages for the loss of his permanent earning capacity. In other words if, notwithstanding his injury, he can engage in other lines of work and make as much money, net, as he could have made had he not been injured, then he would not be entitled to recover for loss of earning capacity.

"You are to try this case under the law and the evidence. You

are not to be moved by sympathy for the plaintiff or because he may be a poor man and in need of money. You are not to take into consideration that the defendant is a railroad or a corporation. Such things should not be considered by a jury. It is your duty to try this case as if it were between two individuals, and to do exact justice to all parties under the oath you took when you entered that jury box.

"You will not consider that the defendant is a corporation, or that it may be able to pay large damages. The ability of a defendant to pay large damages is a matter which can not properly be considered in answering this issue.

"I charge you that such sum as you may feel you would charge to go through the experience which the plaintiff has gone through is not the rule to be applied in cases of this kind. You should give reasonable, fair and just compensation for the injury which he has received, and no more.

"The plaintiff, Walter G. Ferebee, as a party to this ac-
60 tion, has an interest in the outcome of such a character that it is my duty to tell you to scrutinize his evidence with care, and to give due consideration to the fact that he is interested. That is the extent of your consideration, and I do this because the Supreme Court has held that it must be done, but after you have done so, and you shall conclude that he told the truth, you will give the same weight to his evidence that you would to that of any other credible witness.

"The burden of proof is upon the plaintiff, and before you can allow him any damages for deafness in his left ear, he must satisfy you by the greater weight of the evidence that he has sustained an injury to his ear drum which has caused his deafness, and that such injury was due to the result of his falling from the train at the time and place mentioned in the complaint.

"If you find by the greater weight of the evidence, the burden of proof being upon the plaintiff, that he is deaf in his left ear, and you further find that such deafness is due to a catarrhal condition, or to any other cause other than the injury sustained by falling from the train at Wendell, then you could not consider the plaintiff's deafness in fixing the amount of damages. That is true if his deafness was entirely due to another cause.

"In considering whether the plaintiff is deaf in his left ear, it is your duty to consider his demeanor and conduct on the stand, and such evidence of his inability to hear as shown by him in hearing the questions asked by counsel.

"The burden of proof is upon the plaintiff to satisfy you by the greater weight of the evidence of every element of damage which he contends should be considered by you in arriving at your verdict.

"The Court instructs you that it is not proper for you as jurors, for the purpose of reaching an agreement, to put down the different amounts which each one is willing to allow and then divide by twelve for the purpose of striking a general average. That is not proper, the Supreme Court has held.

61 "Each man can decide for himself such amount as he thinks is a just and fair and reasonable compensation to the plaintiff, and you are not required to consent to an answer to the issue which you do not think is justified by the evidence."

By Mr. DOUGLASS:

"I will ask that the charge of loss of mental power be withdrawn from the jury."

By the COURT:

"Gentlemen of the jury, that is withdrawn. You will not consider it in your deliberations. Now, gentlemen, is there anything that I have left out of the charge?"

By Judge WARD:

"Nothing more, I believe."

By R. N. SIMMS:

"I ask that you charge the jury that it is one of the contentions of the defendant that no physician in the case, outside of the osteopaths, has testified to any permanent injury to the man's neck or back."

By the COURT:

"Well, gentlemen, one of the contentions of the defendant is that no physician except the osteopath testified to any permanent injury to the neck or back.

"What amount of damages is the plaintiff entitled to recover of the defendant on account of its negligence? I make this further charge to you. Whatever amount you shall reach, satisfying yourselves by the greater weight of the evidence, as the amount, applying the principles of law and considering all the evidence, you shall write that as your answer to this issue, and nothing more.

"One thing more, gentlemen. I believe I stated to you that this case is to be tried like any other, according to the facts in the case, and not according to sympathy.

"Take the case and go along out and tell me what you think about it."

62 After duly hearing the attorneys of the parties, plaintiff and defendant, the foregoing is duly settled as the statement of case on appeal, at Raleigh, N. C., this September 5, 1914.

C. M. COOKE,
Trial Judge.

Defendant's Grouping and Assignment of Errors.

NORTH CAROLINA,
Wake County:

In the Superior Court, March Term, 1914.

WALTER G. FEREBEE
v.
NORFOLK SOUTHERN RAILROAD COMPANY.

The defendant in the above-entitled action hereby groups and assigns the following exceptions, which are relied upon, to-wit:

First Exception (p. 21 of the record):

This was to the Court's refusal to submit the issues tendered by the defendant. This exception is based upon the ground, among others, that this being a trial under the Federal Employers' Liability Act, the defendant was entitled to have the jury consider these four issues in arriving at a verdict.

Second Exception (p. 21 of the record):

This was to the issue as submitted by the Court. This exception is based upon the ground, among others, that the Federal Employers' Liability Act contemplates that the jury assessing damages shall necessarily consider the alleged negligence of the defendant and the alleged contributory negligence of the plaintiff, and any evidence tending to show negligence attributable to the plaintiff, and that the same could not be properly tried under the issue submitted by the Court, and that the issue submitted was not in conformity with the former decision of the Supreme Court.

Third and Fourth Exceptions (p. 23 of the record):

These were to the allowance of the witness Richardson to testify
63 that a place on plainiff's neck had been apparently "produced by some force coming from a point above the place of injury", etc. These exceptions are based upon the ground, among others, that the witness was permitted to testify about the manner in which the plaintiff had sustained injury when the witness did not see the injury, and when his said testimony so objected to was not that of an expert but was a mere surmise on his part.

Fifth Exception (p. 24 of the record):

This was to the Court's action in allowing the plaintiff to testify that he had been in line for promotion for several months. This exception is based upon the ground, among others, that it was not competent for the plaintiff to testify about his prospects of promotion, and that his Honor did not instruct the jury that they should not consider this testimony, nor did his Honor withdraw or strike out the same.

Sixth Exception (p. 24 of the record):

This was to the refusal of the Court to permit the question to the plaintiff, to wit: "Before you reached Wendell you weren't in the baggage car, were you?" This exception is based upon the

ground, among others, that the defendant was entitled to prove that the plaintiff was out of his place of duty just before the occurrence of the injury, as bearing upon the capability of the plaintiff as a railroad employee an entering into the question of the amount of his damages. This ground of error will be more fully set out in connection with the next two following exceptions.

Seventh Exception (p. 25 of the record):

On cross-examination, the defendant offered to ask the plaintiff the following question: "Mr. Ferebee, you testified, didn't you, that the rules under which you were operating prescribed that the place of the baggage master when on duty was in the baggage car?" Objection by plaintiff to this question.

Thereupon the defendant's counsel stated to the Court: "It is my purpose to show that while this man was supposed to be on duty he was careless and negligent and had left the place
64 where he was appointed to be; and that as bearing upon the value of his services. The question now is as to what is the grade of his capacity. It is a matter of common knowledge that the greater the number of employees the greater the necessity for the qualities of obedience, faithfulness and loyalty to duty. The whole question goes to the earning capacity of this employee. It is my purpose to go further and show that the plaintiff was a careless employee. He can not have a careless quality on other occasions and rid himself of it on this occasion. I certainly cannot be confined to the proof that this man was careless upon other occasions, and not permitted to show as a further item of my proof that on this very occasion he still maintained those careless habits of life. The purpose of this question is to elicit from the plaintiff his admission that he knew that the rules of the defendant company in effect at the time of his injury prescribed that his place while on duty as baggage master was in the baggage car; and it is our purpose further to show that in the violation of this known duty on his part he was immediately before his injury out of his place of duty, out of the baggage car, and sitting in a passenger coach with a gentleman who was smoking a cigarette, and the same is offered as bearing upon the capability of the plaintiff as a railroad employee and as bearing upon the value of his services as an employee, and is directed solely to the issue of damages, and requested to be considered only as bearing upon the quality of the plaintiff's earning capacity as entering into the question of the damages sustained by him on account of the injury described in the complaint."

The plaintiff's objection sustained, and the defendant excepted. This was the defendant's seventh exception. This exception is based upon the ground, among others, which is set out in the foregoing statement made at the time, and is upon the ground that the defendant was entitled to this proof as bearing upon the question
65 of the capability of the plaintiff as a railroad employee, and therefore to be considered in determining the issue as to the amount of damages.

Eighth Exception (p. 27 of the record):

The plaintiff testified on his direct examination that he was

injured by stepping from the front platform of a passenger coach just in the rear of the baggage car at night, by reason of the fact that the steps had been knocked off of the side of the said platform. There was evidence that these steps had been on the train and used when it left the station at Raleigh less than an hour before. The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the steps were, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no such examination to see whether they were there, and that he was at the time both a baggage master and flagman.

On cross-examination he was asked if the rules of the defendant company in force and effect at the time of the injury did not require him as a flagman to make such an examination and see for himself whether the steps were in good condition before using the steps or attempting to use them. There was objection by the plaintiff.

Defendant's counsel stated to the Court: "It is the purpose of the defendant in asking this question to show that the rules of the defendant company in effect at the time complained of, and known to the plaintiff, prescribed and required that the plaintiff, being engaged as a flagman as well as a baggage master, must examine and know for himself that steps were in proper condition before using them. It is our further purpose in this regard to show this as evidence bearing upon the plaintiff's capability as an employee, tending to show his disobedience and non-observance of the rules of his employer, known to him at the time, and is requested to be admitted and considered only as bearing upon the issue of damages."

66 The plaintiff's objection was sustained, and the defendant excepted; and this was the defendant's eighth exception.

This exception is based upon the ground, among others, that the defendant was entitled to this evidence upon the grounds stated at the time and above set out, and upon the ground that the defendant was entitled to have the jury consider such evidence as was herein offered tending to show violation by the plaintiff of known rules of his employer, in force and effect at the time, as showing the grade of his capacity as a railroad employee, and bearing upon the question as to the amount of his damages. The gist of this matter was proving the knowledge by the plaintiff of a rule and his needless and voluntary violation of the same. The defendant contends that it was entitled to have this considered upon a trial of the issue of damages under the Federal Employers' Liability Act, and that, independently of that act, it was competent and proper evidence upon the issue of damages being tried; and also upon the grounds as set out in connection with the two next preceding exceptions as stated at the time.

Ninth Exception (p. 28 of the record):

This was to the Court's action in permitting the plaintiff to ask the defendant's witness, Dr. Moore, "Do you want to leave this jury

under the impression that the plaintiff is faking?" This exception is based upon the ground, among others, that according to the custom and practice of the court this was not a proper form of inquiry.

Tenth Exception (p. 29 of the record):

This was to the action of the Court in permitting the witness Spillman to be asked, "What in your opinion is the effect of this pain, if any, upon the general nervous system of a man?"—and permitting his answer as set out in the above mentioned page of the record. This exception is based upon the ground, among other things, that this was hypothetical testimony and not competent as such, and that the question was not in a proper form for hypothetical testimony, and that it was irrelevant, immaterial and incompetent.

67 Eleventh Exception (p. 29 of the record):

This was to the Court's action in permitting the plaintiff's witness Graves to testify: "Upon examination, I found Mr. Ferebee run down and weak, with a rather troubled expression, both indicating sorrow and suffering." This exception is based upon the ground, among others, that the stated "troubled expression, both indicating sorrow and suffering," of the plaintiff, are not in any way shown to be connected with or attributable to his alleged injuries involved in this suit, and are irrelevant, immaterial and incompetent, and tended to influence the jury adversely to the defendant.

Twelfth Exception (p. 30 of the record):

This was to the action of the Court in refusing to permit the defendant to ask Dr. Payne the question, "State whether or not a person can pass through an examination such as Dr. Glascock exhibited in the manner the plaintiff did and yet have sensations in the parts examined." This exception is based upon the ground, among others, that the defendant was entitled to prove by Dr. Payne, who was admitted to be an expert physician and surgeon, that the demonstration made by the plaintiff's witness with the plaintiff did not necessarily demonstrate an absence of sensation in the parts examined, after having proven Dr. Payne's knowledge about these tests and such matters, as appears in the statement of case on appeal.

Thirteenth Exception (p. 30 of the record):

This was to the action of the Court in permitting the plaintiff to testify that he believed that the defendant's witness Sawyer had feeling towards him. This exception is based upon the ground, among others, that this was manifestly incompetent. Plaintiff might testify as to substantive facts tending to show the feeling of the witness Sawyer towards him, but it was not competent for him to testify as to what he, plaintiff, "believed" about it.

Fourteenth Exception (p. 31 of the record):

68 This was to the action of the Court in permitting the plaintiff to testify that he had seen in Raleigh two night nurses of St. Vincent's Hospital and to introduce in evidence defendant's subpœna for them. This exception is based upon the ground, among others, that it was not shown that the subpœnas had

been served upon these witnesses, or that they were known by the defendant to be present, or that they were present.

Fifteenth Exception (p. 31 of the record):

This was to his Honor's refusal to give the jury the following instruction as requested by the defendant, to wit:

"The plaintiff's right to recover in this action is based upon the act of Congress known as the Frederal Employers' Liability Act, and, under the terms of that act, the conduct of the plaintiff can not be considered as a defense to the action to the extent of destroying the plaintiff's right to recover, but in arriving at the amount of damages you can consider the plaintiff's conduct and the extent to which the injury complained of was brought about by such conduct, and if you find by the greater weight of the evidence that the plaintiff failed to look before attempting to alight from the train at Wendell, and that by looking he could have seen that the steps were missing, and could have avoided falling under the cars, it is your duty to consider such facts in arriving at your answer to the issue submitted to you."

This exception is based upon the ground, among others, that the jury assessing the damages under this act is entitled to consider plaintiff's conduct, etc., as set out in this request.

Sixteenth Exception (p. 32 of the record):

This was to his Honor's refusal to give the jury the following instruction, as requested by the defendant, to wit:

"Under the Federal Employers' Liability Act, the conduct of the plaintiff is to be considered by the jury in determining the amount of damages, and in answering the issue in this case you can consider the conduct of the plaintiff, Walter G. Ferebee, at the time of his injury, in reduction of the damages which you find he has sustained."

69 This exception is based upon the ground, among others, that the jury assessing damages under this act is entitled to consider plaintiff's conduct, etc., as set out in this request.

Seventeenth Exception (p. 32 of the record):

This was to his Honor's refusal to give the jury the following instruction, as requested by the defendant, to wit:

"You should not consider that the defendant is a corporation or that it may be able to pay damage. The ability of the defendant to pay damages is a matter which can not properly be considered by you in answering the issue."

His Honor modified this request and gave it by inserting the word "large" before the word "damage" in both places where the same occurs in this prayer.

This exception is based upon the ground, among others, that the defendant was entitled to have the instruction given as requested, without the modification made by the Judge, and that the insertion by him of the word "large" before the word "damages" was a very substantial variance of the instruction and was highly prejudicial to the defendant, as coming from the Judge to the jury.

Eighteenth Exception (p. 33 of the record):

This was to his Honor's refusal to give the jury the following instruction, as requested by the defendant, to wit:

"In considering the testimony of the medical experts who testified for the plaintiff, you may take into consideration the fact, if you find it to be a fact from the evidence, that they are naturally inclined to view the circumstances that make for plaintiff's side in a favorable light and contrary circumstances in an unfavorable light. You should consider their attitude, demeanor, conduct and manner of answering questions, and the intelligence with which the questions were answered, in making up your mind as to whether you believe the testimony."

This exception is based upon the ground, among others, that this was a correct proposition of law, applicable to the evidence in the case and the action being tried, and that the defendant was entitled thereto.

70 Nineteenth Exception (p. 33 of the record):

This was to the refusal of his Honor to give the jury the following instructions as requested by the defendant, to wit:

"I charge you that you can not give the plaintiff such sum as you feel you would charge to go through the experience which he has gone through. You have no right to give him such sum as you may feel that you would charge for being in the condition in which he claims he is. You should give reasonable, fair and just compensation for the injury which he has received, and no more."

His Honor refused to give this instruction, except in modified form, as it appears in the charge, and the defendant excepted; and this is the defendant's nineteenth exception.

This exception is based upon the ground, among others, that the instruction as requested was correct, and the instruction as given was not a substantial compliance with the request.

Twentieth Exception (p. 33 of the record):

This was to his Honor's refusal to give to the jury the following instruction as requested by the defendant, to wit:

"The plaintiff, Walter G. Ferebee, as a party to this action, has an interest in the outcome of such a character that it is your duty to scrutinize his evidence with care and to give due consideration to the fact that he is interested."

His Honor refused to give this instruction as requested, but added thereto the following: "That is the extent of your consideration, and I do this because the Supreme Court has held that it must be done, but after you have done so, and you shall conclude that he told the truth, you will give the same weight to his evidence that you would to that of any other credible witness."

This exception is based upon the ground, among others, that the instruction as requested was correct and the defendant was entitled thereto as requested; and that the portion added thereto by his Honor was prejudicial and tended by its very phraseology to

71 cause the jury to believe that his Honor thought that they should give slight consideration to this proposition of law, which was very material to the defendant; and more particularly that the statement, "I do this because the Supreme Court has held

that it must be done," was erroneous and highly prejudicial to defendant.

Twenty-first Exception (p. 34 of the record):

This was to the following portion of his Honor's charge, to wit:

"The defendant, by its answer, sets out contributory negligence by the plaintiff. At a former term of this court the issues as to negligence and contributory negligence were settled entirely. This issue was also settled at that trial, but this question we have up now has been sent back by the Supreme Court for a new trial, and that is the issue as to the quantity of damages."

This exception is based upon the ground, among others, that these references to what was done at a former trial tended only to confuse the jury and were prejudicial to the defendant, especially in so far as they referred to this issue as also being settled at that trial, when a large amount of damages was awarded the plaintiff.

Twenty-second Exception (p. 34 of the record):

This was to the following portion of his Honor's charge, to wit:

"Upon the finding of the two first issues, the plaintiff became entitled, as a matter of law, to recover some damages, if only nominal, but upon the verdict upon the third issue as to damages it became necesary before there could be a final disposition of the case, there should be this trial, going through all the formalities on this one issue as we did on the others with respect to the method of trial, and the difference is only the issue, which I shall read to you now, which I submit for your consideration and determination, with such instructions as the Court may submit to you."

This exception is based upon the ground, among others, that this is incorrect as a proposition of law, and by its reference to
72 the former trial tended to confuse and prejudice the jury against the defendant.

Twenty-third Exception (p. 35 of the record):

This was to following portion of his Honor's charge, to wit:

"The rule for ascertainment of damages where the plaintiff has been injured by the negligent conduct of the defendant is that he is entitled to recover damages for past and prospective loss resulting from the defendant's wrongful act, and this may embrace indemnity for actual expenses, nursing, medical attention, and loss of time and disability to work and capacity to earn money, and where, as in this case, it is alleged that there is a permanent disability, and so found by the jury, there should be this element of damage; that is, a compensation for permanent disability, and that is to be determined by the jury."

This exception is based upon the ground, among others, that there was no evidence of any actual expense by the plaintiff for nursing, and that hence the charge's mentioning this item as an element of damages was erroneous.

Twenty-fourth Exception (p. 35 of the record):

This was to the following portion of his Honor's charge, to wit:

"While the two first issues settled the question of negligence and contributory negligence and entitled the plaintiff to recover, but when they come to introduce evidence as to the damages they are

not confined to the same damages, specific evidence of damage, as they were before."

This exception is based on the ground, among others, that this reference to the former trial and the language as used, the proposition as stated, were erroneous and highly prejudicial to the defendant, and tended to confuse the jury. The manner of statement was tantamount to an instruction to the jury to return larger damages than the award at the former trial.

Twenty-fifth Exception (p. 36 of the record):

This was to the following portion of his Honor's charge, to wit:

73 "So they by their evidence the plaintiff alleges and contends that he is damaged in several respects besides his disability to labor."

The defendant excepted to this portion of his Honor's charge, and this constitutes defendant's twenty-fifth exception.

This exception is based upon the ground, among others, that this is erroneous, and in the connection in which it was used, and the manner of its statement, tended to prejudice the defendant.

Twenty-sixth Exception (p. 36 of the record):

This was to the following portion of his Honor's charge, to wit:

"The jury is instructed that they will not give any consideration to the issue of negligence or to the issue of contributory negligence. They are instructed by the Court that these two issues are behind us."

This exception is based upon the ground, among others, that, as stated in connection with other exceptions heretofore noted, this was erroneous as a proposition of law, and in a trial under this act this charge was too sweeping.

Twenty-seventh Exception (p. 37 of the record):

This was to the following portion of his Honor's charge, to wit:

"The plaintiff contends further that his whole nervous system has been and is now shattered, and that he can not control himself in any way."

This exception is based upon the ground, among others, that the evidence did not warrant this charge, and that it was prejudicial to the defendant; and that it was not supported by the plaintiff's allegations.

Twenty-eighth Exception (p. 37 of the record):

This was to the following portion of his Honor's charge, to wit:

"The plaintiff contends further that a large quantity of cinders and dirt got into and under the skin and scalp, and that when it was sewed up on the night of the injury a large quantity

74 of dirt and cinders were sewed up under the skin. He further contends with respect to the amputation of his left arm that it was done in such a way that it soon became extremely painful, and that he had to have a second operation performed, and that he had to have a part of the stock again amputated so that there might be a cushion of flesh over the end of the stump."

This exception is based upon the ground, among others, that this was not supported or warranted by the allegations of the plaintiff

in his complaint, and that the manner of the statement and the context thereof as the same was read to the jury from that portion of the charge written by the plaintiff designated as "plaintiff's contentions" or special instructions, was highly prejudicial to the defendant.

Twenty-ninth Exception (p. 39 of the record):

This was to the following portion of his Honor's charge, to wit:

"The Court further charges you that in this case the plaintiff is entitled to recover as damages one compensation for all of the injuries he has sustained, past and prospective, in consequence of the defendant's wrongful and negligent acts, and the damages awarded are understood to embrace indemnity for actual nursing and medical expenses and loss of time, loss from inability to perform ordinary labor, or incapacity to earn money. The plaintiff is to have a reasonable satisfaction for the loss of both bodily and mental powers, for actual suffering both of mind and body, which are the immediate and necessary consequences of the injury."

There was no evidence that the plaintiff had paid anything as nursing expenses. There was no evidence that the plaintiff had lost any mental powers.

This exception is based upon the ground, among others, that it was unsupported by the evidence and was prejudicial and injected an element of damages for the consideration of the jury which ought not have been considered.

Thirtieth Exception (p. 39 of the record):

75 This was to his Honor's refusal to set aside the verdict.

This exception is based upon the ground, among others, of the errors hereinbefore assigned, and as set out in the statement of case on appeal.

Thirty-first Exception (p. 39 of the record):

This was to his Honor's refusal to grant a new trial.

This exception is based upon the ground, among others, of the errors hereinbefore assigned, and as set out in the statement of case on appeal.

Thirty-second Exception (p. 39 of the record):

This was to his Honor's refusal to set aside the verdict as being excessive.

This exception is based upon the ground, among others, that the verdict was enormously excessive.

Thirty-third Exception (p. 39 of the record):

This was to the refusal of his Honor to award the defendant judgment non obstante veredicto.

Thirty-fourth Exception (p. 39 of the record):

This was to the judgment as entered.

This exception is based upon the ground, among others, of the errors hereinbefore assigned, and appearing in the statement of case on appeal.

Respectfully submitted,

R. N. SIMMS,
Attorney for Defendant.

Clerk's Certificate.

STATE OF NORTH CAROLINA,
County of Wake:

I, Millard Mial, Clerk of the Superior Court in and for the State and county aforesaid, hereby certify the foregoing to be a full, true and perfect transcript of record in an action lately pending in said court, wherein Walter G. Ferebee is plaintiff and Norfolk-Southern Railroad Company is defendant. As the same appears of record and now on file in my office.

76 In testimony whereof, I hereunto set my hand and affix the official seal of said court, at office in Raleigh, N. C., this the — day of September, A. D. 1914.

MILLARD MIAL,
[SEAL.] *Clerk Superior Court.*

Undertaking on Appeal.

NORTH CAROLINA,
Wake County:

In the Superior Court, March Term, 1914.

WALTER G. FEREBEE
v.
NORFOLK-SOUTHERN RAILROAD COMPANY.

Whereas, the defendant in the above-entitled action has appealed from the judgment of the Superior Court of Wake County, North Carolina, to the Supreme Court of North Carolina, and has been required to file an undertaking on appeal in the sum of fifty dollars ($50.00):

Now, therefore, the said Norfolk-Southern Railroad Company, as principal, and the United States Fidelity and Guaranty Company, as surety, hereby, pursuant to statute, undertake and become bound to the plaintiff in the said sum of fifty dollars ($50.00), to the effect that the appellant will pay all costs which may be awarded against it on the appeal.

This 9th day of May, 1914.

NORFOLK-SOUTHERN R. R. CO.,
By R. N. SIMMS, *Attorney.*
U. S. FIDELITY & GUARANTY CO.,
[SEAL.] By A. M. MAUPIN & CO., *G. Ag'ts.*

By WM. B. JONES, *Att'y.*

The above undertaking is approved and filed, this 9th day of May, 1914.

MILLARD MIAL,
Clerk of the Superior Court of
Wake County, North Carolina.

77 *Docket Entries.*

Appeal docketed in Supreme Court of North Carolina September 19th, 1914; argued October 14th, 1914; opinion for the Court by Clark, C. J., and concurring opinion by Walker, J., filed November 11th, 1914, as follows:

78 Supreme Court of North Carolina, August Term, 1914.

#247. Wake.

WALTER G. FEREBEE
vs.
NORFOLK SOUTHERN RAILROAD COMPANY, Appellant.

This is an appeal by defendant from Cooke, J., at March Term, 1914, in an action for the recovery of damages for personal injuries.

Douglass & Douglass for plaintiff.
R. N. Simms for defendant.

CLARK, *C. J.:*

This case was before us 163 N. C. 351, when we directed a partial new trial restricted to the single issue of damages. The first and second exceptions, because the trial judge submitted no other issue, need not be considered.

The third and fourth exceptions are that Dr. Richardson, who had qualified as an expert, was permitted to testify while the plaintiff was being examined and exhibited to the jury: "This place up here (indicating) on the neck, is the most serious injury of the two, and apparently has been produced by some force coming from a point above this place of injury, carrying the head and upper part of the spine forward. I state that for the reason that the neck here * * * ." The witness then proceeded to testify without objection: "My reason for stating that the conditions of this kind may be brought about for two causes, one of them is accidents or injuries in which force produces them, and the other is diseased conditions. Diseased conditions of the spine will frequently, and often do, produce deformities which resemble these in some particulars." (Page 23 of the record.) It has always been held competent for experts to testify as to the character and extent, and to give their opinion as to the producing causes, of wounds, whether or not they were gunshot wounds or produced by sharp or blunt instruments, and to give their opinions generally as to the causes and effects of injuries. The doctor was not giving his opinion
79 as to the manner in which the plaintiff received the injury or as to when or where it was received. Other witnesses testified as to those facts. The objection of the defendant that the doctor was an osteopath cannot be sustained. The Court having found

he was an expert, to what school of medical thought and practice the expert belonged is as irrelevant as to what church or political party he was affiliated with.

Exception 5, that the plaintiff testified as to his prospects of promotion, cannot be sustained. The witness said that when he was a brakeman he got from $40.00 to $48.00; when he was a flagman that he got $55.00 and $60.00, and when he was injured he was getting from $84.00 to $87.00 per month. In response to the question, "How long did you get as much as $80," he replied, "I had been in line for the extra baggage two or three months." This meant, of course, that he had been extra baggage master for that length of time. Besides, upon objection the plaintiff withdrew the question, and to the inquiry how long he had been drawing $80 per month, the witness replied: "Two or three months."

The sixth and seventh exceptions do not require discussion. The plaintiff was a baggage master, but it has no bearing upon this inquiry to show that he was not in the car at the moment of the injury.

The eighth exception is based upon the ground that the Court did not permit the defendant to prove its printed rules by oral testimony of the plaintiff on cross-examination, and is untenable.

The ninth exception is that the Court permitted the plaintiff to ask the defendant's witness, Dr. Moore, "Do you want to leave the jury under the impression that the plaintiff is 'faking'." The manner of the cross-examination is very largely a matter which must be left to the sound judgment and discretion of the learned
80 and impartial trial Judges, and this Court will not interfere except in case of palpable abuse or of injury done appellant, which does not appear to be the case in this instance. The witness was not treated with indignity, nor do we see that the defendant could be prejudiced, by asking the witness if he intended to disparage the plaintiff.

Exception 10. Dr. Spillman, who had treated the plaintiff and testified as to the amputation of his arm, was permitted to state that, "in his opinion, the effect of the pain upon the general nervous system was that the patient gets nervous, can't sleep, and begins to go to pieces all over."

Exception 11. Dr. Graves was permitted to testify: "Upon examination I found Mr. Ferebee run down and weak with a rather troubled expression, both indicating sorrow and suffering." These witnesses were medical practitioners, found to be experts by the court, and we cannot see that this evidence was in any way prejudicial to defendant.

Exception 12. Dr. R. L. Payne, who was admitted as an expert, testified that there were "improved methods in general use in the medical profession for the purpose of examining and demonstrating the sensations or lack of sensations in the patients," and he added that the method used by Dr. Glascock (also an expert witness) was not according to the improved method. The Court refused to permit this witness to state whether or not a person could pass through such an examination as Dr. Glascock had exhibited, and yet have

sensation. We suppose that this exclusion was upon the ground that the witness had already testified fully and had virtually told the jury that the test made by Dr. Glascock had amounted to nothing and a further pursuit of this subject was simply repetition, calculated to give the jury no additional light upon the issue before them.

The statement of the witness that he beli-ved the defend-
81 ant's witness, Sawyer, had feeling towards him, is the thir-
teenth exception. We cannot see that it was in any way prejudicial. At most, it was irrelevant. The fourteenth exception was that the plaintiff testified that two nurses in the Norfolk Hospital, who attended him after his injuries, were then in Court under subpoena by the defendant. This was to show why the plaintiff had not subpoenaed them, and that the defendant having had an opportunity, did not put them on the stand. The fifteenth and sixteenth exceptions for refusal to instruct the jury, as prayed, "to consider the conduct of the plaintiff at the time of his injury", was properly refused, because on the former trial, the jury had responded, "No" to the third issue, "Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?" To permit that injury to be again considered in this trial, in reduction of damages, would be to try again that question, when the sole issue submitted in the new trial granted by the Court, was as to "the damages sustained by the plaintiff by reason of the negligence of the defendant." The jury having already found on the former trial that there had been no contributory negligence, and this having been affirmed by this Court on appeal, the jury could not consider again the matter of contributory negligence in reduction of the damages. The former verdict had established that the plaintiff had been injured by the negligence of the defendant, and that he had not contributed to that injury, and the sole issue submitted to the jury under the direction of this Court, was therefore, as to the amount of the damages.

The Court modified the prayer, "The ability of the defendant to pay damages is a matter which cannot properly be considered by you in answering the issue." The Court modified the charge by inserting the word "large" before the word "damages". We do not think that this, if error, was substantial enough to warrant a new trial,
which is the sole object of taking an exception. That was
82 the seventeenth exception. Neither can we sustain the eigh-
teenth, which was to the refusal of the Court to instruct the jury that "the medical experts who testified for the plaintiffs were naturally inclined to view the circumstances that make for the plaintiff's side in a favorable light, and contrary circumstances in an unfavorable light." This would have been to express an opinion upon the weight of the evidence. The nineteenth cannot avail for the instructions asked were substantially given.

The defendant requested the Court to charge that the plaintiff "as a party to this action has an interest in the outcome of such a character that it is your duty to scrutinize his evidence with care and to give due consideration to the fact that he is interested." The Court gave this, but added the following: "That is the extent of your

consideration, and I do this because the Supreme Court has held that it must be done. But after you have done so and you shall conclude that he told the truth, you will give the same weight to the evidence that you would to that of any other creditable witness."

We cannot, in view of the previous decisions of this Court, say that it was error in his Honor to make such addition to the prayer. In Herndon v. R. R., 162 N. C. 317, the matter is fully discussed and many of the previous rulings of this Court cited in the opinion of the Court and in the dissenting opinion in that case.

In that case, Judge Justice charged the jury upon the weight to be given to the testimony of parties and witnesses as follows: "Weigh all this evidence, gentlemen, in every way, and in weighing it you have a right to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses upon the stand and their demeanor, the interest that they may have shown, or bias upon the stand, if any, the means they have of know-
83 ing that to which they testify, their character and reputation, in weighing this testimony, so as to arrive at the truth of what this matter is."

In order to settle this matter for the future, we commend to the Judges of the Superior Court this charge as a full and clear statement of duty of jurors in passing upon the evidence of parties when they are witnesses. We think that nothing more need be added to it. It is all that is necessary.

As to the twenty-first exception, the Court properly told the jury: "At a former term of this Court, the issues as to negligence and contributory negligence were settled entirely. This issue was also settled at that trial, but this question we have up now has been sent back by the Supreme Court for a new trial, and that is the issue as to the quantity of the damages."

Exceptions 22 and 23 are to paragraphs of the charge, which we do not find objectionable.

Exception 24 is because the Court charged the jury, "while the first two issues settled the question of negligence and contributory negligence and entitled the plaintiff to recover, when they come to introduce evidence as to the damages, they are not confined to the same damages, specific evidence of damages as they were before." That is, that on a new trial as to damages, the plaintiff is not restricted to the same evidence which he used on the former trial. This is correct. Nor was there any error in exception 25, because the Court told the jury that, "the plaintiff alleged and offered evidence that he is damaged in several respects besides his disability to labor," nor in exception 26, because the jury were instructed that they could not give any consideration to the issues of negligence and contributory negligence, because those two issues had been settled in the former trial.

Exception 27 is to a statement of a contention of the plaintiff and no exception was made to it during the progress of the trial.
84 If the statement that the plaintiff so contended was erroneous, the defendant should have called it to the attention of the Court for correction at the time. Jeffress v. R. R., 168 N. C. 215,

for it was not as to a matter of law but as to a statement of fact, which the Judge should have been given opportunity to correct at the time.

Exception 28 presents exactly the same proposition, of an alleged error in stating a contention of the plaintiff.

Exception 29 is because the Judge included in his charge as elements of damages "nursing" and "loss of mental powers". As to the nursing, the Judge restricted the allowance for cash paid out for medical and nursing bills to $250.00, when the plaintiff testified that he had actually paid out between $250 and $275 for medical assistance and medicines. As to the "loss of mental powers", the Judge was requested to withdraw that from the consideration of the jury as an element of damages and the Court told the jury, "that is withdrawn. You will not consider it in your deliberations."

The other exceptions were to the refusal to set aside the verdict; refusal to grant a new trial; refusal to set aside the verdict as being excessive. To the refusal of a judgment non obstante veredicto, and to the judgment as entered. All of these are merely formal, and are based upon the exceptions already discussed.

No error.

85

#247.

FEREBEE
v.
NORFOLK-SOUTHERN RAILWAY CO.

Wake.

WALKER, *J.* (concurring in result):

The Judge should have given the instruction requested by the defendant in regard to the interest of the plaintiff as a witness, without adding the qualifying clause, and without any reference to the correctness of the proposition as decided by this Court. The prayer was this: "As a party to this action, he has an interest in the outcome of such a character that it is your duty to scrutinize his evidence with care and to give due consideration to the fact that he is interested." The court gave this instruction, but added the following: "That is the extent of your consideration, and I do this because the Supreme Court has held that it must be done. But after you have done so, and you shall conclude that he told the truth, you will give the same weight to the evidence that you would to that of any other creditable witness." The qualification of the instruction, as prayed for by the plaintiff, was the subject of defendant's 20th exception. This question was considered in Herndon v. Railroad Co., 162 N. C. 317; State v. Vann, 162 N. C. 534, cited and approved in Herndon's case, and in the case of In re Smith's Will, 163 N. C. 464. The Court decided in the Herndon case (by Justice Brown), quoting from and approving what is said in 30 Am. & Eng. Enc. of Law, at p. 1094, that while the testimony

of a party in interest, as that of any other witness, must be submitted to the jury, the interest is a matter to be considered by the jury in weighing the testimony and determining what force it shall have. It is very generally held proper to instruct the jury that they may take into consideration the interest of a party or other witness in determining the credibility of his testimony, and according to the weight of authority the court may instruct the jury that they should consider such interest. Instructions of this character are not
86 objectionable as charging the jury with respect to matters of evidence, and the refusal of such instruction is error, and the error is not cured by a general instruction that the jury are the judges of the credibility of the witnesses and the weight to be given to the testimony of each, nor by an instruction that the jury are to use their common sense and experience in regard to the credibility of witnesses, citing also, for the same proposition, 38 Cyc. 1729. There was a dissenting opinion in Herndon's case, based upon the distinct ground that the Judge should not charge the jury "that because of interest they should carefully scrutinize the evidence of the defendant, without adding that, if the jury believe the evidence, it should not have the same weight as if the witness was not interested." This was the point of plaintiff's exception in this case, that without this addition or qualification, the bare instruction that they should consider the interest of the witness in the event of the action, and give it such weight as they may think it should have, in passing upon his credibility, was indirectly an expression of opinion prejudicial to the witness, and therefore error. But the majority of the Court did not take this view, and, on the contrary, held that no such modification was necessary or should be made, and no expression of opinion could be fairly inferred by the jury from the language used. The Chief Justice, dissenting from this decision, relied upon State v. Holloway, 117 N. C. 732; State v. McDowell, 129 N. C. 532, and other cases of a like kind. It may be admitted that there is some authority for the present contention of the appellee, that such a qualification of the general instruction is proper, but it has so recently been rejected, in explicit terms, as misleading, even if, in itself, sensible, that we prefer to stand by the ancient rule, which was adopted and enforced by this Court for so many years, even down to a very recent date. In State v. Vann, 162 N. C. at p. 541, we expressly approved what was said in State v. Byers, 100 N. C. 512, for a unanimous Court, by Justice Ashe, who always
87 stated a legal principle with great accuracy and proper limitation, as follows, in regard to such testimony: "It was their duty to scrutinize the testimony (of certain witnesses) carefully, because of their interest in the result, but, notwithstanding such interest, they might believe all they had said or only a part of it, or none of it, according to the conviction produced upon their minds of its truthfulness." And there he stopped, as did the Judge below in giving the charge to the jury in that case. He cited with approval the following cases; State v. Nash, 30 N. C. 35; State v. Nat-51 N. C. 114; Flynt v. Bodenhamer, 80 N. C. 205; State v. Hardee, 83 N. C. 619; Ferrall v. Broadway, 95 N. C. 551, and these are not

all that he might have cited to sustain the ruling as to what is the proper instruction in the circumstances. In State v. Nash, supra, this Court sustained this as a correct instruction: "The law regards with suspicion the testimony of near relations when testifying for each other, and it is the province of the jury to consider and decide on the weight due the testimony." And so in State v. Nat, supra, this one: "When near relations depose for near relations, their testimony is to be received, and ought to be received, with many grains of allowance." In Hardee's case, supra, it was held that the nature of the particular caution to be given by the Judge to prevent an improper use of testimony, likely to be biased, and an excessive confidence in it, must be left largely to the sound discretion of the court, no special form being required, but only such general guidance as will enable the jury to understand clearly how they may consider it, the matter being at least one upon which they must exercise their good judgment and their common sense, as to the weight that should be given to the circumstance of interest or to any other fact calculated to produce bias, and they should be freed from any arbitrary rule which would require the witness to be put upon a perfect equality with other witnesses, who, apart from any
88 consideration of bias at all, may have more intelligence, knowledge and character than the witness in question, and who, in other respects, have had better opportunity for information as to the matter under investigation. If the jury conclude that a party or an interested person, who testifies in the cause, has divested himself of all prejudice or leaning toward his own side, and has honestly endeavored to tell the truth, they should not stop there, but find whether he is entitled, in other respects, to their favorable consideration, by himself or in comparison with other witnesses, and yet the Court instructed the jury in this case that, "after you (they) have done so," (that is, found that he is honest and truthful and had no bias), "You (they) will give the same weight to the evidence that you (they) would to that of any other credible witness," which means, because it so says, that he should stand upon the same base with them, when there may be many other considerations which tend to impeach his character or to weaken his testimony. If the court meant that, if in giving his testimony, the witness was not influenced by his interest in the cause, he is entitled to be classed as a disinterested person in weighing his testimony, the charge would have been unobjectionable, as that is a self-evident proposition, and the jury would be likely to understand it and act accordingly, without any special advice from the court, but that it not what was said, and by the qualification to the requested instruction, the witness was presented in a better attitude than he should, perhaps, have occupied before the jury. The credit due to a witness is not determined alone by his interest, or lack of personal interest, in the cause, as a party or otherwise, but his intelligence, demeanor on the stand, character, and so forth, must be placed in the balance when weighing his testimony. This idea is well expressed by Judge Pearson in State v. Williams, 47 N. C. 257. The learned Judge in

that case was referring to the rule falsum in uno, falsum in
89 omnibus, and repudiating it as an unsafe one, because no fixed rule can be formulated for guaging the jury's belief in the credibility of a witness. They may consider even one false statement he may have made during the trial, as bearing upon it, but not as necessarily controlling and requiring them to disregard all of his testimony. State v. Hardee, 83 N. C. at 622. The remarks of Judge Pearson, in the Williams' case, are very pertinent here. He said: "The charge of the Judge directs the attention of the jury to the question to be decided; his control over the admissibility of evidence excludes all that is incompetent and the jury are relied on to find the truth. It is the exclusive province of the jury to decide issues of fact, and to pass upon the credit of witnesses; when the credit of a witness is to be passed on each juror is called on to say, whether he believes him or not; this belief is personal, individual, and depends upon an infinite variety of circumstances; any attempt to regulate or control it, by a fixed rule, is impracticable, worse than useless, inconsistent and repugnant to the nature of a trial by jury, and calculated to take from it the chief excellence, on account of which it is preferred by the common law to any other mode of trial, and to adopt in its place the chief objection to a fixed tribunal. 'Do I believe what that witness has sworn to?' is a question for each juror. The statement may be more or less probable, and in accordance with the way in which men act and things occur. It may be more or less corroborated by the testimony of other witnesses and the attendant circumstances. The manner of the witness, even his looks, may impress my mind more or less favorably, and this is the reason every witness is required, by the common law, to be examined in the presence of the jury. Is it practicable to frame a general rule by which my belief must be regulated?" And I ask the same question in this case. Commenting upon this passage, taken from the opinion of Judge Pearson in the Williams' case, Chief Justice Smith said in Ferrall v. Broadway, 95 N. C. at p. 559:
90 "The charge is not corrected, and its objectionable features removed, by the reference to the second instruction to which it is subjected; for while the latter is appropriate and proper, its efficacy is neutralized by the part of the instruction, to which we have adverted, preceding it. If cautionary words had been used in calling the attention of the jury to the possible consequences of a verdict declaring the illegitimacy of the plaintiffs, to induce a careful scrutiny of the evidence, it might not have overstepped the limits of judicial right, as in regard to the testimony of an accomplice; State v. Hardin, 19 N. C. 407; or the discredit attaching to the testimony of near relations; State v. Nash, 30 N. C. 35; or to that of fellow-servants: State v. Nat, 53 N. C. 114; or the detection of a witness in a false statement upon his sworn examination; State v. Smith, 53 N. C. 132; but these matters of discredit are for the jury to weigh and consider, and are not rules of law to control the jury. State v. Noblet, 47 N. C. 418; Wiseman v. Cornish, 53 N. C. 218; Flynt v. Bodenhamer, 80 N. C. 205." Numerous other authorities

could be cited to the same effect, and which strongly support the view herein taken.

This question has undergone discussion very recently in the case of In re Smith, 163 N. C. 464. It is true counsel there insisted that, in directing the jury how to pass upon the testimony of interested witnesses, it was not sufficient for the Judge, as was done in that case, to charge merely that the jury might consider any bias they may have had (if any at all) by reason of their relation to the parties in the cause, but that he should have added that if the jury found that they were not influenced thereby, they should have the same credit as any other witness, as was said in State v. Holloway, 117 N. C. 732, and that with reference to this suggestion as to the addition, we stated that no such special instruction was asked, and therefore the point was not directly raised. But the
91 Court, after stating preliminarily, that the instruction should not have been so qualified if the special request had been made, observed substantially that, if the jury had decided that the witnessess were not biased by their interest or relationship, they should not necessarily have received the credit due to other witnesses, and — put upon an equality with them, as the credit to which they were entitled depended, not upon their bias or indifference alone, but upon other circumstances as well—as for example, their intelligence and their appearance and deportment while on the stand; their character, whether good or bad, their means of knowledge; the probability of their story—these and other matters entered into the estimate of the value to be attached to the testimony of the witnesses, and the jury had the right to put them in the scales, in weighing the testimony, for the purpose of separating the true from the false and finally ascertaining where was the preponderance of the evidence. It may be proper for a judge to tell the jury "that if the witness is not biased by his interest, his testimony should have the same weight as if he was not interested," as said in some of the cases, for this is a truism, and a sensible jury would not overlook it. It is a proposition that proves itself but it does not mean that the witness shall occupy a position of equality with another who has a better character, more sense and knowledge of the facts, a stronger memory, superior judgment, and whose other qualities and advantages inspire the jury with greater confidence in his credibility. Speaking of the rule of the common law, whereby parties to and persons interested in the event of an action were disqualified, this Court said in Hill v. Sprinkle, 76 N. C. 353: "For generations past and up to the last few years, interest in the event of the action, however small, excluded a party altogether as a witness, and that upon the ground, not that he may not sometimes speak the truth, but because it would not
92 ordinarily be safe to rely on his testimony. This rule is still applauded by great judges as a rule founded in good sense and sound policy. The parties to the action are now competent witnesses, but the reasons which once excluded them still exist, to go only to their credibility." We think that this change in the law of evidence was a wise and salutary one, but it did not

abolish the other rules of evidence, and the jury should not be handicapped by an imperative instruction that, in the absence of bias of some who are interested, they should give credit to all the witnesses equally, as those who have had no interest may, in other respects and apart from any consideration of bias or impartiality, be more reliable. It is undoubtedly true that interest naturally produces bias, for we have been told that, "If self the wavering balance shake, it's rarely right adjusted," but notwithstanding this tendency of our nature and our frailty, the witness may resist the temptation which thus besets him and prove himself to be worthy of credit. Smith v. Moore, 142 N. C. 277. If he is not in fact prejudiced by his relation to the cause or the parties, the jury may then consider whether there are other circumstances which impair the strength of his testimony, such as want of intelligence, character, knowledge of the facts, and so forth. The subject has so recently been fully discussed in this Court that further comment is unnecessary. Herndon v. R. R., 162 N. C. 317. See also State v. Vann, 162 N. C. 534, which, *which*, while not so authorative as it would have been had the question been directly presented for decision, is nevertheless worthy of serious consideration, as in itself correct, and especially as being fully in line with the cases which have been decided here and elsewhere for nearly a century. Referring again to Judge Pearson's clear and vigorous statement of the law, as applicable to such cases, we cannot safely or wisely bind the jury by any "hard and fast rule," but should leave them at full liberty
93 to judge of a witness's credibility in view of all the surrounding circumstances, his interest and probable bias being one of them. Let the jury consider the interest of the witness, as they are very apt to do, whether they are so instructed or not, and give it such weight, or no weight, as in their judgment it should have. This is the safest and best rule, to leave the matter as much at large as possible, trusting to the intelligence and honesty of the jury to so balance the facts as to give to the witness, whose interest is involved, his due proportion of credit or discredit. This view was entertained by the Court also in Herndon v. Railroad Co., supra, where through Justice Brown, who wrote the opinion, it approved this charge given below: "His Honor, after charging fully, fairly and correctly on each issue, concluded his charge with these words, to which plaintiff excepts, to-wit: 'Weigh all of this evidence, gentlemen, in every way, and in weighing it you have a right to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses upon the stand and their demeanor, the interest that they may have shown, or bias, upon the stand, the means they have of knowing that to which they testify, their character and reputation, in weighing this testimony, so as to arrive at the truth of what this matter is. Take the case, gentlemen'." In this connection it may be said that the rule to be found in 30 Am. & Eng. Enc. of Law, 1094, and 38 cyc. 1729, and stated above, was adopted in that case as the true one and as sustaining the charge, without any addition or qualification whatsoever. Though there was a dissent in Herndon v. Railroad Co., supra,

there was none in the case of In re Smith's Will, supra, where the question was more sharply and formally stated and discussed with full reference to the authorities.

For these reasons, I would dissent from the judgment of this Court and the opinion, as I think the Judge came danger-
94 ously near to the expression of his personal opinion upon the weight of testimony, in his reference to what had been decided by this Court, and also that he laid down an erroneous rule in regard to interested witnesses, refusing the simple and correct instruction, as requested by defendant's counsel. As said in 38 Cyc. p. 1772: "It is improper for a judge to weaken the force of a proper instruction by sarcastic comment (or any expression of his opposition to the settled principle), so as to leave the jury in doubt whether the instruction was given or refused, or by intimating that, although the instructions given in behalf of a party are correct, they present a loose and inadequate presentation of the law applicable to the case, or to intimate that his personal opinion is otherwise than the law he charges." But after a most careful review of the entire record, I am convinced that the error worked no substantial disadvantage to the defendant, and that, all things considered, the case has been fairly and correctly decided upon its real merits, and the error, therefore, is not sufficient for a reversal. The Court, at a former term, had passed upon the questions of negligence, which are involved, unfavorably to the defendant (163 N. C. 351), and another trial may be still worse for it, as the damages have been increased, so far, in "arithmetical progression," and practical wisdom dictates that it is better to halt here, than to risk a steady and "harmonic progression" here after. I therefore concur in the result.

As the opinion of the Court is now worded, I hardly know (what) the law has been declared to be. It is very certain that Herndon v. Railroad Co., 162 N. C. 317, decides, by the clearest implication, that the addition to the prayer in this case was error. The entire instruction, as given, falls under the condemnation of Hill v. Sprinkle, 72 N. C. 353, cited and quoted from at length in Herndon v. Railroad Co., supra, which says: "At all events, the charge
95 is not such a clear and distinct enunciation of an important principle or fact as could leave any reasonable doubt of its meaning in the minds of the jury. The prayer was distinct, and the response should have been equally so." This is an important question, and should be decided finally, one way or the other, for the charge is either erroneous in law or not so, and the question should not be left open in the way of a mere suggestion to the Judges. The addendum is clearly harmful, if it is not correct, as it gives the interested witness a credit to which he is not entitled, by ranking him with those who are disinterested and are better qualified, in every way, to testify as to the facts.

96 *Judgment.*

Supreme Court of North Carolina, August Term, 1914.

No. 247. Wake County.

WALTER G. FEREBEE
vs.
NORFOLK SOUTHERN RAILROAD COMPANY.

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court to the intent that the judgment be affirmed.

And it is considered and adjudged further that the defendant and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twenty and 60/100 dollars ($20.60) and execution issue therefor.

97 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect transcript of the record of appeal, together with the petition for writ of error, assignment of errors, bond, writ of error, and citation in the case lately pending in this Court, e-titled Walter G. Ferebee v. Norfolk Southern Railroad Company, as appears from originals on file in this Court.

Witness my hand and the seal of said Court at office in Raleigh, this December 31st, 1914.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court, North Carolina.

Endorsed on cover: File No. 24,523. North Carolina Supreme Court. Term No. 779. Norfolk Southern Railroad Company, plaintiff in error, vs. Walter G. Ferebee. Filed January 19th, 1915. File No. 24,523.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

Norfolk Southern Railroad Company,
Plaintiff in Error,

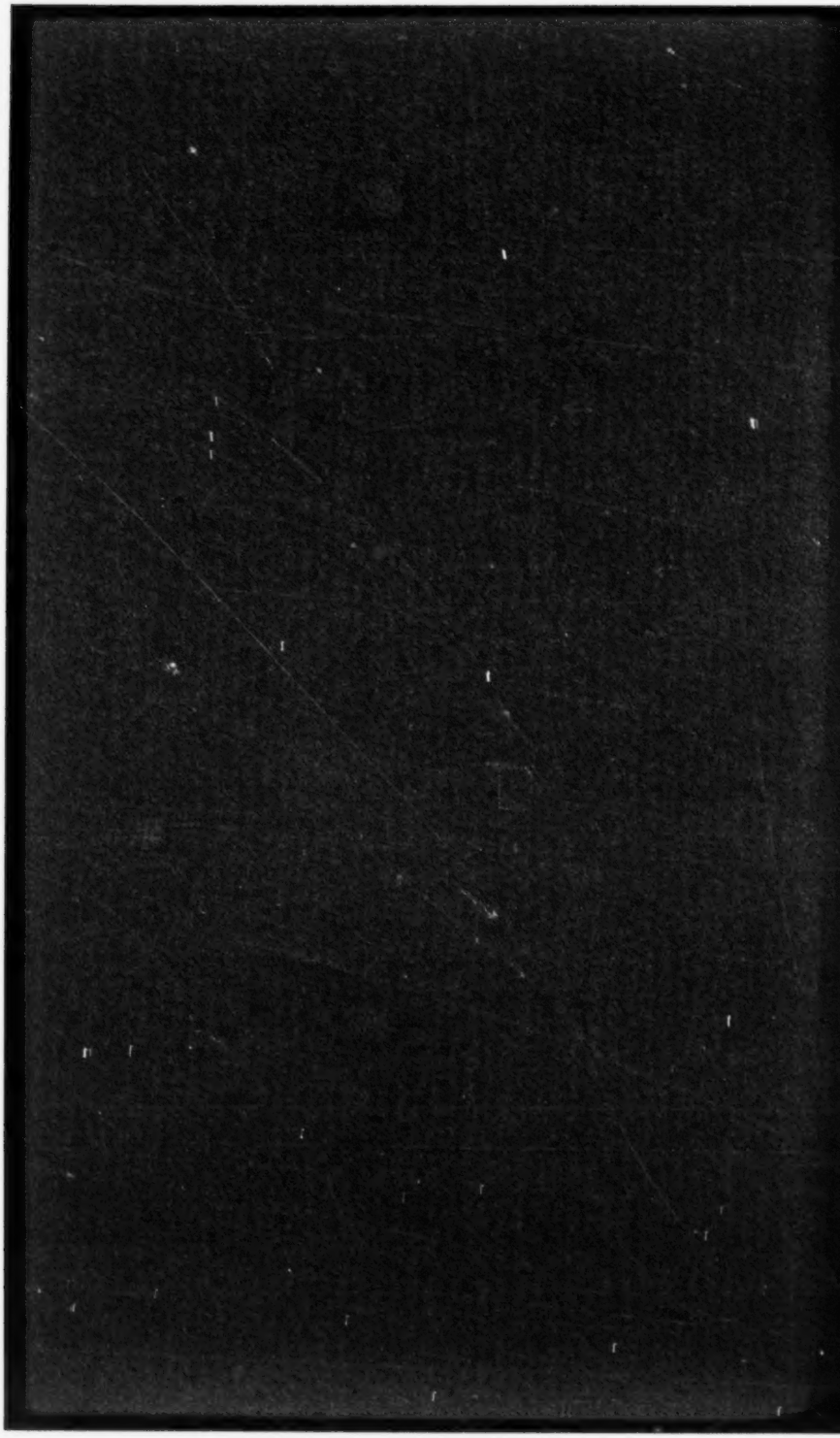
vs.

Walter G. Perkins,
Defendant in Error.

No. 779

Defendant in Error moves to dismiss the writ of error or affirm the judgment entered by the Supreme Court of North Carolina, and submits in support of said motion the brief of Walter G. Perkins, defendant in error, and brief in support of motion of Walter G. Perkins to dismiss the writ of error or affirm the judgment rendered by the Supreme Court of North Carolina.

WILLIAM C. DOUGLAS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

NORFOLK-SOUTHERN RAILROAD COMPANY,
Plaintiff in Error.

v.

WALTER G. FEREBEE,
Defendant in Error.

No. 779

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

MOTION ON BEHALF OF WALTER G. FEREBEE, DEFENDANT IN ERROR, TO DISMISS THE WRIT OF ERROR OR AFFIRM THE OPINION AND JUDGMENT RENDERED BY THE SUPREME COURT OF NORTH CAROLINA; AND, IF THE COURT SHOULD DESIRE TO HEAR ARGUMENT, TO TRANSFER SAID CAUSE TO THE SUMMARY DOCKET.

Comes now the Defendant in Error, Walter G. Ferebee, by his counsel, William C. Douglass and Clyde A. Douglass, appearing in his behalf, and moves the court to dismiss the writ of error in the above-entitled cause for want of jurisdiction upon the grounds hereinafter set forth in the brief filed herewith.

The Defendant in Error further moves the court to affirm the opinion and judgment rendered by the Supreme Court of North Carolina, upon the ground that it is manifest that the writ of error was taken for delay only and that the questions on which the decision of the cause depend are so frivolous as not to need further argument. If the court should desire to hear argument, then the Defendant in Error further moves the court to order this cause transferred to the summary docket provided for by this court in an amendment to Rule 6, as the case is of such a character as not to justify extended argument.

The grounds of these motions, the statement of the case, facts and argument are more fully set forth in the briefs accompanying the motions, all of which is herewith submitted.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

Notice to Norfolk-Southern Railroad Company.

To Norfolk-Southern Railroad Company, Plaintiff in Error:

Please take notice that on Monday, the.....day of ....., 1915, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Attached hereto are copies of the motions to dismiss and affirm, the briefs and arguments to be submitted in support thereof; and also the motion to transfer this cause to the summary docket, if the court should desire to hear argument thereon.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1914.

NORFOLK-SOUTHERN RAILROAD COMPANY,
Plaintiff in Error.
v.
WALTER G. FEREBEE,
Defendant in Error.

No. 779

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

DEFENDANT IN ERROR'S BRIEFS ON MOTIONS TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION, AND TO AFFIRM THE JUDGMENT OF THE STATE COURT.

STATEMENT OF CASE.

This was an action brought in the Superior Court of Wake County, North Carolina, by the Defendant in Error to recover damages for personal injuries. The action was brought under the "Employers' Liability Act" of Congress.

At the time of his injury, Defendant in Error was an employee of the Plaintiff in Error as baggage-master and flagman on a train carrying passengers and freight from Raleigh, North Carolina, to Norfolk, Virginia, and it was part of the Defendant in Error's duties to get out on the

steps of the baggage car as the train moved into a station yard, for the purpose of receiving the United States Mail, and, further, of preventing passengers from getting on or off when it was in motion, and to assist the conductor in seeing that the passengers entered and departed from the train in safety; that on June 2nd, 1912, at 9:15 p. m., the train on which Defendant in Error was employed left the station yard in the City of Raleigh on its regular run for Norfolk, and, as it was approaching the station of Wendell, about twenty miles from Raleigh, Defendant in Error, in the line of his duty, went on the platform of the car and started down the steps, and, they having been torn away after the train left Raleigh, he fell through the opening, was dragged some distance by the train, and was fearfully crushed and multilated, and permanently injured; the night was dark; there was no light on the platform at the time, except a little railroad lantern, carried by Defendant in Error, and which threw no light up or down, but just "glared from the sides." For some weeks or longer prior to the said injury, on the platform or walk-way of the trestle, in the Jones Street yard, in the City of Raleigh, Plaintiff in Error had left a number of boxes to hold oil-cans for Engineers and other things; these boxes four feet tall and thirteen and eighteen inches thick, the same being on the trestle platform, setting up on end and unsecured in any way and about four feet from the rail, leaving them twelve or fourteen inches from the car. On the night in question, one or two of these boxes, toppled over, from the jar or other causes, and struck and tore away the steps, and thus occasioned the injury complained of.

The first trial of this case was had at the February Term, 1913, of the Superior Court of Wake County, and the issues on which it was submitted and determined were as follows:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer: "Yes."

2. What is the whole amount of damages, if any, sustained by the plaintiff?

Answer: $15,000.00.

3. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

Answer: "No."

4. What amount, if any, shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to the plaintiff's own negligence?

Answer: .....

There was judgment in the Superior Court upon the verdict, and an appeal taken by the Plaintiff in Error to the Fall Term, 1913, of the Supreme Court of North Carolina. The cause was heard in the State Supreme Court and an opinion and judgment filed therein on October 13, 1913. (See 163 N. C., page 351; 79 S. E., page 685.) In the said opinion and judgment the Supreme Court of North Carolina held as follows:

> "We find no reversible error affecting the determination of the first and third issues."
>
> "On perusual of the record, however, we must hold that there was error committed on the trial of the issue as to damages. For the error indicated, there must be a new trial. Partial New Trial."

The case was remanded to the Superior Court of Wake County for a new trial by a jury on the *issue of damages.*

This issue of damages was submitted to a jury in the Superior Court of Wake County at the March Term, 1914, of said court and determined upon the following issue:

"What amount of damages is the plaintiff entitled to recover of the defendant on account of its negligence?"

Answer: $18,000.00.

Judgment was rendered on this verdict and the Plaintiff in Error (the defendant in the lower court) excepted and ap-

pealed to the Supreme Court of North Carolina, and at the Fall Term, 1914, of said court, the said appeal was heard and determined, and the opinion and judgment rendered, as set forth on page.... of the printd record.

BRIEF ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

It is true that this action was brought and tried under a Federal Statute, but the State Courts, under the Act, have concurrent jurisdiction, and this court has no jurisdiction to review the judgment of the State Court unless the Plaintiff in Error has been denied some right, privilege or immunity specially set up and claimed by it in the State Courts under the Federal Employers' Liability Act.

Seaboard Air Line Railway v. Duval, 225 U. S.; 56 L. E., page 1171.

We have searched in vain for any Federal question upon which the Supreme Court of North Carolina rested its opinion and judgment; and unless it is lurking in the proposition that the Supreme Court of North Carolina denied to the Plaintiff in Error some right, privilege or immuntiy in granting a *"partial new trial,"* at the Fall Term, 1913, of said court, we are at a loss to grasp the point of Plaintiff in Error's contention.

The court will note that the Plaintiff in Error made no objection and reserved no exception to the order of the Supreme Court of North Carolina in directing a new trial upon the single issue of damages. The Plaintiff in Error acquiescing therein, entered the contest in its effort to reduce the amount of damages. In this it failed. The second jury, procured at the instance of the Plaintiff in Error, increased the amount of damages. We will not venture to say what

course the Plaintiff in Error would have pursued if the jury had materially decreased the damages.

So the question fairly presented upon this motion to dismiss for want of jurisdiction is this:

Was the Plaintiff in Error denied a right, privilege or immunity when the trial judge in the Superior Court, in the second trial, refused to re-submit to the jury the issues of negligence and contributory negligence, which had been passed on in the former trial, which had been upheld by the Supreme Court of North Carolina, and in the face of the order of the Supreme Court of North Carolina, to try the case upon the issue of damages alone?

We think it hardly necessary to consider the authority or right of the Supreme Court of North Carolina to order a *partial new trial.* This has been the practice of the courts in all the past. In any event this court will not attempt to regulate the practice in a State Court.

County of Buiena Vista v. Iowa, etc., R. R. Co., 112 U. S.; 28 L. E., 680.

Yazoo, etc., R. R. Co. v. Adams, 180 U. S., 8; 45 L. E., 408.

There is no assignment of error bearing upon the issues of negligence or contributory negligence, and the jury, in the first trial in the court below, having found these issues in favor of the Defendant in Error, the Plaintiff in Error is thereby concluded. So the sole question involved comes back to the original contention of the Plaintiff in Error, that the Supreme Court of North Carolina had no power to award a new trial on the single issue of damages, after the findings of the jury had concluded the Plaintiff in Error on the other issues. The Plaintiff in Error admitted that the Defendant in Error was injured to some extent. (See Plaintiff in Error's answer, page..... of the record.)

There could be no *diminution of damages* under the Employers' Liability Act, unless there was *contributory negli-*

gence found by the jury. So that, the issue submitted in the second trial was the proper and only one to be answered by the jury. Section three of the Act provides:

"* * * The fact that the employee may have been guilty of *contributory negligence,* shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The Defendant in Error earnestly contends that the Plaintiff in Error was denied no right, privilege or immunity under the Federal Employers' Liability Act, and that the writ of error should be dismissed for want of jurisdiction.

But if the court should be of the opinion that a federal question is presented in the writ of error, the Defendant in Error contends that the writ of error was taken for delay only and the questions are so frivolous as not to justify argument, and the opinion and judgment of the Supreme Court of North Carolina should be affirmed.

BRIEF ON MOTION TO AFFIRM.

The Defendant in Error contends that the record in this case shows clearly that the writ of error was taken for delay only, and that the questions on which the decision depends are so frivolous as not to need further argument, and that the case is of such a character as not to justify extended argument.

The Plaintiff in Error comes to this court with seventeen assignments of error. Numbers one to seven, inclusive, relate to the refusal of the trial court to reopen the question of contributory negligence, which had been determined in the first trial, and were *res judicata.* This question has been argued by us upon our motion to dismiss for want of jurisdiction, and we refrain from going further into this, and content ourselves with referring to said argument and the able

opinion and judgment of the Supreme Court of North Carolina at page..... of the record.

The eighth assignment of error has no semblance of a federal question, being entirely a matter within the discretion of the trial Judge, and we deem it unnecessary to argue the same.

The ninth and tenth assignments of error are wholly without merit, and extremely frivolous. We content ourselves with referring to the opinion and judgment of the Supreme Court of North Carolina on this point, (page..... of the record); the further fact that there was evidence of money paid for nursing, (page..... of the record); and the further fact that the trial Judge in his charge to the jury limited the recovery of the Defendant in Error to the sum of $250.00 for nursing and medical bills, when the Defendant in Error testified that he had paid out between $250.00 and $275.00 for medical assistance and medicines, (page.... of record.)

The Defendant in Error therefore prays the court to affirm the opinion and judgment of the Supreme Court of North Carolina. The Defendant in Error further prays the court, if he is permitted to do so, to tax the Plaintiff in Error with damages in addition to interest, as this writ of error was manifestly taken to delay the proceedings on the judgment of the Supreme Court of North Carolina, and was sued out merely for delay.

Respectfully submitted,

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 779.

NORFOLK-SOUTHERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

WALTER G. FEREBEE, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTION TO DISMISS.

W. B. RODMAN,
JNO. H. SMALL,
R. W. SIMS,
Attorneys for Plaintiff in Error.

(24,523)

SUBJECT INDEX.

CITATIONS.

IN THE

SUPREME COURT OF THE UNITED STATES.

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PLAINTIFF IN ERROR,

vs.

WALTER G. FEREBEE, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTION TO DISMISS.

Status of the Case.

This action was brought and tried under the Employers' Liability act of April 22d, 1908 (35 Stat. at L., 65, ch. 149, U. S. Comp. Stat. Sup., 1911, page 1322), to recover damages for personal injuries received by the plaintiff, now defendant in error, Walter G. Ferebee, who was, at the time the alleged injuries were sustained, employed by the defendant, now plaintiff in error, Norfolk-Southern Railroad Company, as baggage-master and flagman on a passenger train which was being operated between Raleigh, N. C., and Norfolk,

Va., and which was alleged and admitted to have been engaged in interstate commerce. The case was originally tried at the February term, 1913, of the Superior Court of Wake County and judgment rendered against the defendant for $15,000.00, from which the defendant appealed to the Supreme Court of North Carolina. The appeal was heard at fall term, 1913, and a new trial ordered upon the issue of damages for error in the admission of testimony (163 N. C., 351). The case was again tried upon the issue of damages alone at March term, 1914, of the Superior Court of Wake County, and from a judgment rendered for $18,000.00 defendant again appealed to the Supreme Court of North Carolina, and this judgment was affirmed at fall term, 1914, in an opinion rendered by Chief Justice Clark. The opinion of the court will be found in the Southeastern Reporter, volume 83, page 360, and at page — of the printed record.

The writ of error which brings the case before this court was signed by Chief Justice Clark, of the Supreme Court of North Carolina, upon the petition of the defendant.

Motion is now made by the defendant in error to dismiss the writ of error or affirm the opinion and judgment rendered by the Supreme Court of North Carolina and to transfer the cause to the summary docket.

In stating the case and in the argument we use the word "plaintiff" as meaning defendant in error, and "defendant" as meaning plaintiff in error.

Statement of the Case.

This was a civil action brought in the Superior Court of Wake County, North Carolina, for the recovery of damages on account of injuries suffered by the plaintiff and alleged to have been caused by the negligence of the defendant. The defendant denied the allegations of negligence and pleaded contributory negligence as a bar to plaintiff's right to recover and in diminution of his damages, as will appear from the pleadings. At the time of his injury the de-

fendant was engaged in interstate commerce, and plaintiff was employed in such commerce. Plaintiff's right to recover and the defenses available to the defendant rested, therefore, entirely upon the provisions of the Federal Employers' Liability act, and both in the trial court and in the Supreme Court of North Carolina this act was accepted as controlling.

At the time of his injury the plaintiff was employed as baggagemaster and flagman on a train of the defendant, which left Raleigh Sunday night, June 2, 1912, at 9:15 p. m., en route for Norfolk, Virginia. There was an entire absence of defect in the cars constituting defendant's train when it left Raleigh, and the only unusual event at the time the train was leaving that point was an extremely severe windstorm. The train proceeded from Raleigh on its trip to Norfolk and when it reached Wendell, a station twenty miles east of Raleigh, plaintiff attempted to leave the train, as he alleged, in the course of his duties; but, as the defendant contended, without necessity and in his own interest only, and in doing so he fell from the front platform of the first passenger coach back of the baggage coach and suffered injuries, which are made the basis of this action. The steps belonging to the platform from which he fell had been in place and in good condition and used by persons in mounting the train just before it left the station at Raleigh, N. C., and thereafter in the short time occupied in the run from Raleigh to Wendell they had been knocked off by collision with some obstacle, the defendant contending that such obstacle had been blown into contact with them by the severe, violent, and unusual storm raging in Raleigh as the train was leaving (Printed Record, page —).

The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the steps were, and at the time of his fall, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no such examination to see whether they were there (Printed Record, page —).

ARGUMENT.

The motion to dismiss or affirm the judgment of the Supreme Court of North Carolina is based upon the contention that plaintiff in error has been denied no right, privilege, or immunity especially set up or claimed by it in the State court under the Federal Employers' Liability act. The only case cited as authority in support of this contention is Seaboard Air Line Railway *vs.* Duvall, 225 U. S., 483. An examination of that case will show that it not only fails to sustain the defendant in error, but establishes the jurisdiction of the court and the right of plaintiff in error to have the judgment of the Supreme Court of North Carolina reviewed. Mr. Justice Lurton, writing the opinion of the court says:

> "This action was brought under an act of Congress. If the act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled was denied, a right has been denied under the statute, and the question may be reviewed by this court."

The assignments of error which we will quote herein, if our contentions based thereon are correct, will bring this case clearly within the jurisdictional requirements set forth by Justice Lurton, and show that the defendant has been denied rights, privileges, and immunities created by and arising under the Federal act.

It would be difficult to conceive a clearer denial of a right arising under the Federal act than one in which the amount of damages assessed by the jury has been arrived at by the application of an erroneous rule or by the failure to apply a correct rule when such rule is embodied in a prayer for instruction by the defendant. It will be observed that the act creates a liability "in *damages* to any person suffering injury" while he is employed by an interstate carrier and en-

gaged in interstate commerce. The interpretation of the word "damages" and the elements which shall constitute such damages necessarily involves a construction of the act and an erroneous interpretation of it, resulting in harm to the party complaining, is the denial of a right under the act and presents a Federal question. That this is true is made manifest by the recent case of Seaboard Air Line Railway *vs.* Horton, 233 U. S., 492, in which there was involved the correct interpretation of "assumption of risk," as that expression is used in the Employers' Liability act, and the judgment of the Supreme Court of North Carolina was reversed upon the ground that the interpretation by that court of assumption of risk as it exists under the Federal act was erroneously based upon the State law and not upon the principles of the common law. It was also held that there was an erroneous construction of the word "negligence" as used in the Federal act, and the erroneous construction of the act by the Supreme Court of North Carolina was held to be such a denial of a right arising under the act as to give this court jurisdiction.

In the Horton case a motion was made to dismiss for want of jurisdiction, and denied in the following language of Mr. Justice Pitney:

> "There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the Employers' Liability act was especially set up or claimed in the State court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act, which, if acceded to, would presumably have produced a verdict in its favor, and consequent immunity from the action, this motion must be denied, upon the authority of St. Louis, I. M. & S. R. Co. *vs.* McWhirter, 229 U. S., 265."

In a number of recent cases, decided by this court, the basis of jurisdiction has been the denial of a proper con-

struction and application of the Federal Employers' Liability act:

St. Louis, S. F. & T. R. Co. *vs.* Seale, 229 U. S., 156.
St. Louis, I. M. & S. Ry. Co. *vs.* Hesterly, 228 U. S., 702.
North Carolina R. Co. *vs.* Zachary, 232 U. S., 248.
Grand Trunk W. R. Co. *vs.* Lindsay, 233 U. S., 42.
Pederson *vs.* D., L. & W. R. Co., 229 U. S., 146.
Bridget Mc Govern *vs.* Philadelphia & R. Ry. Co., 35 S. C. Rep., 127.

An erroneous construction of the measure of damages under the Federal act has been held sufficient to give the Supreme Court jurisdiction on writ of error to a State court.

Gulf, etc., Ry. Co. *vs.* McGinnis, 228 U. S., 173.

In the case last cited, there was a reversal for error in an instruction of the trial court upon the issue of damages.

In the case of Michigan Central R. Co. *vs.* Vreeland, 227 U. S., 59, in error to the Circuit Court of the United States for the Northern District of Ohio, and American R. Co. *vs.* Didricksen, 227 U. S., 224, in error to the District Court of the United States for Porto Rico, assignments of error involving the question of the measure of damages under the Federal act were considered, and in each case there was a reversal for erroneous instructions on the measure of damages.

In St. Louis, I. M. & S. Ry. Co. *vs.* Taylor, 210 U. S., 281, 292, the basis of the jurisdiction of this court over State courts is stated as follows:

> "The judicial power of the United States extends 'to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority.' Article III, section 2, Constitution. The case at bar, where the right of action was based solely upon an act of Congress, assuredly was a case 'arising under

* * * the laws of the United States.' It was settled once for all time in Cohens *vs.* Virginia, 6 Wheat., 264, that the appellate jurisdiction authorized by the Constitution to be exercised by this court, warrants it in reviewing the judgments of State courts so far as they pass upon a law of the United States. It was said in that case (p. 416): 'They (the words of the Constitution) give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided;' and it was further said (p. 379): 'A case in law or equity consists of the right of one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.' But the appellate jurisdiction of this court must be exercised 'with such exceptions and under such regulations as the Congress shall make.' Article III, section 4, Constitution. Congress has regulated and limited the appellate jurisdiction of this court over the State courts by section 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. Murdock *vs.* Memphis, 20 Wall., 590, 620. The words of that section material here are those authorizing this court to re-examine the judgments of the State courts 'where any title, right, privilege, or immunity is claimed under * * * any statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up, or claimed under such * * * statute.' There can be no doubt that the claim made here was specifically set up, claimed, and denied in the State courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. McCormick *vs.* Market Bank, 165 U. S., 538; California Bank *vs.* Kennedy, 167 U. S., 362; San Jose Land

Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177; Nutt *vs.* Knut, 20 U. S., 12; Rector *vs.* City Deposit Bank, 200 U. S., 405; Illinois Central Railroad *vs.* McKendree, 203 U. S., 514; Eau Claire National Bank *vs.* Jackman, 204 U. S., 522; Hammond *vs.* Whittredge, 204 U. S., 538. The principles to be derived from the cases are these: Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the State court a right or immunity under a law of the United States and it has been denied him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statutes of the United States be secured so that they shall have the same meaning and effect in all the States of the Union."

In St. Louis, Iron Mountain & Southern Ry. *vs.* McWhirter, 229 U. S., 265, it is held that:

"A decision of the highest court of a State, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service act of March 4, 1905 (34 Stat. at L., 1416, chap. 2939, U. S. Comp. Stat. Supp., 1911, p. 1321), and the Employers' Liability act of April 22, 1908, (35 Stat. at L., 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and in which, at the close of the evidence, defendant has requested the court to instruct the jury to find in its favor, necessarily involves an adverse determination of a Federal question, *i. e.*, defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the State court."

Chief Justice White says:

> "While it is true, as we have said, that coming from a State court, the power to review is controlled by Rev. Stat., sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

In the McWhirter case the court considered alleged errors concerning the following subjects: First, the refusal to give the binding instructions asked by the defendant; and, second, an instruction given over the objection and exception of the defendant concerning the act of Congress commonly known as the hours of service act, and in connection therewith a special charge on the same subject given by the court of its own motion, which was excepted to by both parties (229 U. S., at p. 277).

It is not contended by the defendant in error, in support of the motion to dismiss for want of jurisdiction, that this was not an action arising under a statute of the United States—that it is such an action is manifest—but the position is advanced that there has been no denial of a right created by such statute. We submit that the assignments of error present the denial by the Supreme Court of North Carolina and by the trial court of most important rights to which the plaintiff in error was entitled.

It Was Competent for Defendant to Show Violation of Its Rules by Plaintiff at the Time of His Injury.

The trial court excluded evidence, which defendant attempted to develop on cross-examination of plaintiff, tending to minimize the damages sustained by showing plaintiff's violation of the rules of his employer at the time of his injury. Plaintiff testified on his direct examination that he

was injured by stepping from the front platform of a passenger coach just in the rear of the baggage car at night by reason of the fact that the steps had been knocked off of the side of the platform. There was evidence that these steps had been on the train and used when it left the station at Raleigh, less than an hour before. The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the steps were, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no such examination to see whether they were there, and that he was at the time both baggagemaster and flagman. On cross-examination he was asked if the rules of the defendant company in force and effect at the time of the injury did not require him as a flagman to make such an examination and see for himself whether the steps were in good condition before using the steps or attempting to use them. There was objection by the plaintiff. Defendant's counsel stated to the court:

> "It is the purpose of the defendant in asking this question to show that the rules of the defendant company in effect at the time complained of, and known to the plaintiff, prescribed and required that the plaintiff, being engaged as a flagman as well as a baggagemaster, must examine and know for himself that the steps were in proper condition before using them. It is our further purpose in this regard to show this as evidence bearing upon the palintiff's capability as an employee, tending to show his disobedience and non-observance of the rules of his employer, known to him at the time, and is requested to be admitted and considered only as bearing upon the issue of damages."

The plaintiff's objection was sustained, and the evidence was excluded (Assignment of error No. —; Printed Record, page —).

This assignment of error presents the question of the right of plaintiff in error to present to the jury important evidence tending to meet and destroy one of the most material factors in estimating the amount of damages to be awarded, that is, the decrease in plaintiff's earning capacity. The measure of damages as defined by the trial court in his charge to the jury was made to include indemnity for disability to work and loss of "capacity to earn money" (Printed Record, page —). In order to enhance the damages growing out of the loss of capacity to earn money, plaintiff was permitted to testify that his wages were on the increase, and that he was in line for promotion (Printed Record, page —). The evidence discloses that as brakeman he received $40 to $48, as flagman he received $55 to $60, and the next position in line of promotion, baggagemaster, would pay $84 to $87. The jury under the instructions of the court were directed to consider the loss of capacity to earn money. This necessarily involved a consideration of the probability of promotion and advance in wages, as well as his ability and fidelity as an employee. It was open to the defendant, in order to have the damages, as defined by the Federal act, measured by a correct standard to meet the plaintiff's evidence by showing that he was not a faithful and competent employee and that the probability of promotion was seriously affected, if not destroyed, by this fact. As bearing upon this question, could the defendant present more forceful evidence than plaintiff's own admission that at the very time of the occurrence in controversy he was careless and was acting in direct disobedience of the rules of his employer? We earnestly submit that the defendant has been denied the very important right of having this action tried under a correct interpretation of the Federal act and that serious prejudice has resulted therefrom. The Supreme Court of North Carolina had ruled that the case should be tried again solely for the purpose of determining the amount of damages to which plaintiff was entitled under this act. The elements of such damages

present a Federal question. The statute gives to the injured employee the right to offer evidence of the various elements making up the damages sustained. To the defendant the converse right is given to meet the plaintiff's case with evidence tending to minimize or destroy the alleged elements of damage. Can it be said that this right is not denied when the State court excludes material evidence offered by the defendant, which, if admitted, would presumably have resulted in a reduction of the amount of damages awarded? The defendant presented this question in a somewhat different form, by its requests for instruction, which were refused, as follows:

> "The plaintiff's right to recover in this action is based upon the act of Congress known as the Federal Employers' Liability act, and, under the terms of the act, the conduct of the plaintiff cannot be considered as a defense to the action to the extent of destroying the plaintiff's right to recover, but in arriving at the amount of damages you can consider the plaintiff's conduct and the extent to which the injury complained of was brought about by such conduct, and if you find by the greater weight of the evidence, that the plaintiff failed to look before attempting to alight from the train at Wendell, and that by looking he could have seen that the steps were missing, and could have avoided falling under the cars, it is your duty to consider such facts in arriving at your answer to the issue submitted to you." This was the defendant's fifteenth exception (Assignment of error No. 5, Printed Record, page —).
>
> "Under the Federal Employers' Liability act, the conduct of the plaintiff is to be considered by the jury in determining the amount of damages, and in answering the issue in this case you can consider the conduct of the plaintiff, Walter G. Ferebee, at the time of his injury, in reduction of the damages which you find he has sustained" (Assignment of error No. 6, Printed Record, page —).

The Supreme Court of North Carolina Committed Error in Confining the Trial to the Single Issue of Damages.

The plaintiff in error assigns as error the action of the Supreme Court of North Carolina in ordering a new trial on the issue of damages alone as follows:

> "That the Supreme Court of North Carolina erred in awarding a new trial upon the issue of damages only at fall term, 1913, of said court; this being an action arising under the provisions of the act of Congress entitled: 'An act relating to the liability of common carriers by railroads to their employees in certain cases,' approved April 22, 1908, enacted by Congress in pursuance of the power conferred upon and vested in it by article I, section 8, clause 3, of the Constitution of the United States" (Assignment of error No. 1, Printed Record, page —).

This question is also raised by issue tendered by the defendant, by objection and exception to the issue submitted and by exception to instructions, as will appear from the following assignments of error:

> "At the second trial the defendant (plaintiff in error) tendered an issue reading as follows: 'What amount shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to plaintiff's own negligence?' The Superior Court refused to submit this issue, and the defendant (plaintiff in error) excepted, and the Supreme Court of North Carolina erred in overruling the said exception of the defendant (plaintiff in error)" (Assignment of error No. 2, Printed Record, page —).
>
> "The Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to the issue as submitted by the Superior Court at the second trial, which was in the following language: 'What amount of damage is the plaintiff entitled to recover of the defendant on account of its negligence' (Assignment of error No. 3, Printed Record, page —)?

> "For that the Supreme Court of North Carolina committed error in refusing to hold that the trial court committed error in instructing the jury as follows, to wit: 'The jury is instructed that they will not give any consideration to the issue of negligence or to the issue of contributory negligence. They are instructed by the court that these two issues are behind us'" (Assignment of error No. 7, Printed Record, page —).

It is unquestionably true, as stated by counsel for the defendant in error, and the cases cited sustain the statement, that decisions of a State court of last resort construing a State statute will be followed by the United States courts, but we do not regard this statement as applicable to the present case. Here we have the decision of a State court on a question of practice the result of which is to deny the plaintiff in error a fair trial under a Federal statute. If such result can be brought about by the application of rules of practice adopted by the State courts, then the State courts would have it within their power to do indirectly what this court has repeatedly said cannot be done directly by State legislation or judicial construction—that is, the power to control the application and effect of the Federal act.

Seaboard Air Line Ry. *vs.* Horton, 233 U. S., 492.
Michigan Central R. Co. *vs.* Vreeland, 227 U. S., 54.

If the result of the action of the Supreme Court of North Carolina, in the present case, in ordering a new trial on the issue of damages was to deny the defendant the right to have the case determined in accordance with the provisions of the Federal Employers' Liability act, it would seem to follow that the defendant has been denied a right arising under that act. It is true that the North Carolina court has frequently held that it is proper to order a partial new trial or a new trial on one of the several issues arising in the case, but in none of the cases so decided was there involved a Federal

statute, and in none of the cases was it so apparent that fairness to the defendant demanded a new trial of all the issues. We say this because the measure of damages under the Employers' Liability act is determined by a comparison of the conduct of the carrier and that of the injured employee. Section 3 provides:

> "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," etc.

This section has been held to create "a system of comparative negligence, whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier; in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee."

Grand Trunk W. R. Co. *vs.* Lindsay, 233 U. S., 42.
Norfolk & W. R. Co. *vs.* Earnest, 229 U. S., 114.

Is it not essential that the jury assessing damages under this act should be in possession of the facts of the occurrence in order to properly and fairly estimate the damages to which the employee is entitled; and if this has been denied, is it not clearly the denial of a right arising under the Federal act?

The practice of granting a new trial on the issue of damages alone in an action for negligent injury has not met the universal and unqualified approval of the Supreme Court of North Carolina. In Jarrett *vs.* Trunk Co., 144 N. C., 302,

the court expressed a willingness to re-examine that question, but found it unnecessary to do so in that case because a new trial was awarded on all issues. Mr. Justice Walker, writing the opinion of the court says:

> "We will, however, caution the judges of the Superior Court in respect to such practice, and invite their attention to what is said in Benton *vs.* Collins, 125 N. C., at page 91: 'Before such partial new trials, however, are granted, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters,' and we will add, that *before such partial new trial is ordered it should clearly appear that no possible injustice can be done to either party.* In cases of this character we do not know that the practice is generally to be commended. In the case at bar an examination of all the evidence relating to the injury and its cause and the conduct of the plaintiff, as well as of defendant's agents, might show that it is so interwoven with that relating to damage that to fairly ascertain what is a just compensation the plaintiff should receive, if he is entitled to recover at all can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries" (144 N. C., at page 302). (Italics ours.)

We submit that the State courts should not be permitted to administer the Employers' Liability act in piecemeal, and that the present case is an example of the great harm which will result from such practice. We think it manifest that the result in this case would have been different upon a proper application of the Federal act. That it *might* have been different is the test of jurisdiction and the right to a reversal.

North Carolina R. Co. *vs.* Zachary, 232 U. S., 248.

In conclusion, we earnestly contend that this case comes clearly within the jurisdiction of this court and the judgment

of the Supreme Court of North Carolina should not be affirmed, and, further, that the questions here involved are of great importance to the plaintiff in error and to the carriers whose rights and liabilities are governed by the Employers' Liability act and justify full consideration on oral argument, which is not permitted by the limited time allowed on the call of the summary docket.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

(27819)

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 779

NORFOLK-SOUTHERN RAILROAD CO.
Plaintiff in Error

vs.

WALTER G. FEREBEE
Defendant in Error

Brief of Plaintiff in Error on the Merits.

W. B. RODMAN,
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Counsel for Plaintiff in Error.

24,523 COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

SUBJECT INDEX.

CITATIONS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

NORFOLK-SOUTHERN RAILROAD COMPANY,
Plaintiff in Error.
v.
WALTER G. FEREBEE,
Defendant in Error.
No. 779.

Brief of Plaintiff in Error on the Merits.

STATEMENT OF THE CASE.

This action was brought and tried under the Employers' Liability Act of April 22, 1908 (35 Stat. at L., 65, ch. 149, U. S. Comp. Stat. Sup., 1911, page 1322), to recover damages for personal injuries received by the plaintiff, now defendant in error, Walter G. Ferebee, who was, at the time the alleged injuries were sustained, employed by the defendant, now plaintiff in error, Norfolk Southern Railroad Company, as baggagemaster and flagman on a passenger train which was being operated between Raleigh, N. C., and Norfolk, Va., and which was alleged and admitted to have been engaged in interstate commerce. The case was originally tried at the February Term, 1913, of the Superior Court of Wake County, and judgment rendered against the defendant for $15,000, from which the defendant appealed to the Supreme Court of North Carolina. The appeal was heard at Fall Term, 1913, and a new trial ordered upon the issue of

damages for error in the admission of testimony (163 N. C., 351). The case was again tried upon the issue of damages alone at March Term, 1914, of the Superior Court of Wake County, and from a judgment rendered for $18,000 defendant again appealed to the Supreme Court of North Carolina, and this judgment was affirmed at Fall Term, 1914, in an opinion rendered by Chief Justice Clark. The opinion of the Court will be found in the Southeastern Reporter, Vol. 83, page 360, and at page 53 of the printed record.

The writ of error which brings the case before this Court was signed by Chief Justice Clark, of the Supreme Court of North Carolina, upon the petition of the defendant.

Motion was made by the defendant in error to dismiss the writ of error or affirm the opinion and judgment rendered by the Supreme Court of North Carolina, and to transfer the cause to the summary docket.

The motion to transfer the case to the summary docket was allowed and the case now comes up on the docket.

In stating the case and in the argument we use the word "plaintiff" as meaning defendant in error, and "defendant" as meaning plaintiff in error.

This action was brought in the Superior Court of Wake County, North Carolina, for the recovery of damges on account of injuries suffered by the plaintiff and alleged to have been caused by the negligence of the defendant. The defendant denied the allegations of negligence and pleaded contributory negligence as a bar to plaintiff's right to recover and in diminution of his damages, as will appear from the pleadings. At the time of his injury the defendant was engaged in interstate commerce, and plaintiff was employed in such commerce. Plaintiff's right to recover and the defenses available to the defendant rested, therefore, entirely upon the provisions of the Federal Employers' Liability Act, and both in the trial court and in the Supreme Court of North Carolina this act was accepted as controlling.

At the time of his injury the plaintiff was employed as

baggagemaster and flagman on a train of the defendant which left Raleigh Sunday night, June 2, 1912, at 9:15 p. m., en route for Norfolk, Virginia. There was an entire absence of defect in the cars constituting defendant's train when it left Raleigh, and the only unusual event at the time the train was leaving that point was an extremely severe windstorm. The train proceeded from Raleigh on its trip to Norfolk and when it reached Wendell, a station twenty miles east of Raleigh, plaintiff attempted to leave the train, as he alleged, in the course of his duties, but, as the defendant contended, without necessity and in his own interest only, and in doing so he fell from the front platform of the first passenger coach back of the baggage coach and suffered injuries, which are made the basis of this action. The steps belonging to the platform from which he fell had been in place and in good condition and used by persons in mounting the train just before it left the station at Raleigh, N. C., and thereafter in the short time occupied in the run from Raleigh to Wendell they had been knocked off by collision with some obstacle, the defendant contending that such obstacle had been blown into contact with them by the severe, violent, and unusual storm raging in Raleigh as the train was leaving (printed record, page 28).

The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the steps were, and at the time of his fall, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no such examination to see whether they were there (printed record, page 28).

SPECIFICATIONS OF ERROR

The plaintiff in error specifies and relies upon the following errors committed by the Supreme Court of North Carolina:

1. "That the Supreme Court of North Carolina erred in

awarding a new trial upon the issue of damages only at Fall Term, 1913, of said court, this being an action arising under the provisions of the act of Congress entitled: 'An act relating to the liability of common carriers by railroads to their employees in certain cases,' approved April 22, 1908, enacted by Congress in pursuance of the power conferred upon and vested in it by article I, section 8, clause 3, of the Constitution of the United States." (Assignment of error No. 1, printed record, page 3.)

2. "At the second trial the defendant (plaintiff in error) tendered an issue reading as follows: 'What amount shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to plaintiff's own negligence?' The Superior Court refused to submit this issue, and the defendant (plaintiff in error) excepted, and the Supreme Court of North Carolina erred in overruling the said exception of the defendant (plaintiff in error)." (Assignment of error No. 2, printed record, page 3.)

3. "The Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to the issue as submitted by the Superior Court at the second trial, which was in the following language: 'What amount of damage is the plaintiff entitled to recover of the defendant on account of its negligence?'" (Assignment of error No. 3, printed record, page 3.)

4. "The plaintiff testified on his direct examination that he was injured by stepping from the front platform of a passenger coach just in the rear of the baggage car at night by reason of the fact that the steps had been knocked off of the side of the said platform. There was evidence that these steps had been on the train and used when it left the station at Raleigh less than an hour before. The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the steps were, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no

such examination to see whether they were there, and that he was at the time both a baggagemaster and flagman.

"On cross examination he was asked if the rules of the defendant company in force and effect at the time of the injury did not require him as a flagman to make such an examination and see for himself whether the steps were in good condition before using the steps or attempting to use them. There was objection by the plaintiff.

"Defendant's (plaintiff in error) counsel stated to the Court: 'It is the purpose of the defendant in asking this question to show that the rules of the defendant (plaintiff in error) company in effect at the time complained of, and known to the plaintiff (defendant in error), prescribed and required that the plaintiff (defendant in error), being engaged as a flagman as well as a baggagemaster, must examine and know for himself that the steps were in proper condition before using them. It is our further purpose in this regard to show this as evidence bearing upon the plaintiff's (defendant in error) capability as an employee, tending to show his disobedience and non-observance of the rules of his employer, known to him at the time, and is requested to be admitted and considered only as bearing upon the issue of damages.'

"The plaintiff's (defendant in error) objection was sustained, and the defendant (plaintiff in error) excepted; and this was the defendant's (plaintiff in error) eighth exception."

The defendant (plaintiff in error) especially contended in the Court below that it was entitled to have this evidence considered upon a trial of the issue of damages under the Federal Employers' Liability Act. The Supreme Court of North Carolina sustained the action of the Court below, and committed error in so overruling the exception of the defendant (plaintiff in error). (Assignment of error No. 4, printed record, page 3.)

5. For that the Supreme Court of North Carolina committed error in affirming the action of the Superior Court

in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error), to wit:

"The plaintiff's (defendant in error) right to recover in this action is based upon the act of Congress known as the Federal Employers' Liability Act, and, under the terms of the act, the conduct of the plaintiff (defendant in error) cannot be considered as a defense to the action to the extent of destroying the plaintiff's (defendant in error) right to recover, but in arriving at the amount of damages you can consider the plaintiff's (defendant in error) conduct and the extent to which the injury complained of was brought about by such conduct, and if you find, by the greater weight of the evidence, that the plaintiff (defendant in error) failed to look before attempting to alight from the train at Wendell, and that by looking he could have seen that the steps were missing, and could have avoided falling under the cars, it is your duty to consider such facts in arriving at your answer to the issue submitted to you." This was the defendant's (plaintiff in error) fifteenth exception. (Assignment of error No. 5, printed record, page 4.)

6. For that the Supreme Court of North Carolina committed error in affirming the action of the Superior Court in refusing to give the jury the following instruction as requested by the defendant (plaintiff in error), to wit:

"Under the Federal Employers' Liability Act the conduct of the plaintiff is to be considered by the jury in determining the amount of damages, and in answering the issue in this case you can consider the conduct of the plaintiff, Walter G. Ferebee, at the time of his injury, in reduction of the damages which you find he has sustained." This was the defendant's (plaintiff in error) sixteenth exception. (Assignment of error No. 6, printed record, page 5.)

7. For that the Supreme Court of North Carolina committed error in refusing to hold that the trial court committed error in instructing the jury as follows:

"The jury is instructed that they will not give any con-

sideration to the issue of negligence or to the issue of contributory negligence. They are instructed by the Court that these two issues are behind us." This was the defendant's (plaintiff in error) twenty-sixth exception. (Assignment of error No. 7, printed record, page 5.)

8. For that the Supreme Court of North Carolina committed error in upholding the trial Court in its refusal to grant a new trial. This was the defendant's (plaintiff in error) thirty-first exception in the Court below. (Assignfent of error No. 11, printed record, page 6.)

9. For that the Supreme Court of North Carolina committed error in upholding the trial Court in refusing to set aside the verdict. This was the defendant's (plaintiff in error) thirtieth exception in the Court below. (Assignment of error No. 12, printed record, page 6.)

10. For that the Supreme Court of North Carolina committed error in upholding the trial Court in refusing the defendant's (plaintiff in error) motion for judgment *non obstante veredicto*. This was the defendant's (plaintiff in error) thirty-third exception in the Court below. (Assignment of error No. 13, printed record, page 6.)

11. For that the Supreme Court of North Carolina committed error in refusing to sustain the defendant's (plaintiff in error) exception to the judgment as signed by the trial Court. This was the defendant's (plaintiff in error) thirty-fourth exception in the Court below. (Assignment of error No. 14, printed record, page 6.)

12. For that the Supreme Court of North Carolina committed error in rendering the final judgment it did against the defendant (plaintiff in error) Norfolk Southern Railroad Company, and which is complained of in this case. (Assignment of error No. 16, printed record, page 6.)

13. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action in that the defendant (plaintiff in error) has been denied a construction of the Federal Employers' Liability Act,

to which it was entitled, and which, if granted, would have defeated the plaintiff's (defendant in error) right to the judgment he recovered herein. (Assignment of error No. 16, printed record, page 6.)

The questions presented relate to:

First, the conduct of the Supreme Court of North Carolina in ordering a new trial on the issue of damages alone. This question is raised by issues tendered by the defendant as shown by assignment of error No. 2, by exception to the single issue submitted: "What amount of damage is the plaintiff entitled to recover of the defendant on account of its negligence?" (Assignment of error No. 3), by request to instruct the jury that they could consider the plaintiff's conduct in answer to the issue submitted (assignments of error Nos. 5 and 6) and by exception to the instruction given by the Court to the jury that they should not give any consideration to the issues of negligence and contributory negligence. (Assignment of error No. 7.)

Second. The exclusion of evidence tending to show the violation of defendant's rules by the plaintiff at the time of his injury, which was offered for the purpose of meeting the plaintiff's evidence of probability of promotion and increased pay and of his ability and fidelity as an employee. This question was raised by exception to the exclusion of evidence that the rules of the defendant required him as flagman to make an examination and see for himself whether the steps were in good condition before using the steps or attempting to use them. (Assignment of error No. 4.)

The other assignments of error relied upon, which cover formal exceptions noted at the trial, also raise the above questions.

ARGUMENT.

It Was Competent for Defendant to Show Violation of Its Rules by Plaintiff at the Time of His Injury.

The trial Court excluded evidence, which defendant attempted to develop on cross examination of plaintiff, tending to minimize the damages sustained by showing plaintiff's violation of the rules of his employer at the time of his injury. Plaintiff testified on his direct examination that he was injured by stepping from the front platform of a passenger coach just in the rear of the baggage car at night by reason of the fact that the steps had been knocked off of the side of the platform. There was evidence that these steps had been on the train and used when it left the station at Raleigh less than an hour before. The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the steps were, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no such examination to see whether they were there, and that he was at the time both baggagemaster and flagman. On cross examination he was asked if the rules of the defendant company in force and effect at the time of the injury did not require him as a flagman to make such an examination and see for himself whether the steps were in good condition before using the steps or attempting to use them. There was objection by the plaintiff. Defendant's counsel stated to the Court:

> "It is the purpose of the defendant in asking this question to show that the rules of the defendant company in effect at the time complained of, and known to the plaintiff, prescribed and required that the plaintiff, being engaged as a flagman as well as a baggagemaster, must examine and know for himself that the

steps were in proper condition before using them. It is our further purpose in this regard to show this as evidence bearing upon the plaintiff's capability as an employee, tending to show his disobedience and non-observance of the rules of his employer, known to him at the time, and is requested to be admitted and considered only as bearing upon the issue of damages."

The plaintiff's objection was sustained, and the evidence was excluded. (Assignment of error No. 4, printed record, page 3.)

This assignment of error presents the question of the right of plaintiff in error to present to the jury important evidence tending to meet and destroy one of the most material factors in estimating the amount of damages to be awarded, that is, the decrease in plaintiff's earning capacity. The measure of damages as defined by the trial Court in his charge to the jury was made to include indemnity for disability to work and loss of "capacity to earn money" (printed record, page 37). In order to enhance the damages growing out of the loss of capacity to earn money, plaintiff was permitted to testify that his wages were on the increase, and that he had been promoted from brakeman to flagman and had been running as extra baggagemaster for two months (printed record, page 26). The evidence discloses that as brakeman he received $40 to $48, as flagman he received $55 to $60, and the next position, baggagemaster, would pay $84 to $87. The jury under the instructions of the Court were directed to consider the *loss of capacity to earn money.* This necessarily involved a consideration of the probability of promotion and advance in wages, as well as his ability and fidelity as an employee. It was open to the defendant, in order to have the damages, as defined by the Federal act, measured by a correct standard to meet the plaintiff's evidence by showing that he was not a faithful and competent employee and that the

probability of promotion was seriously affected, if not destroyed by this fact.

Capacity is synonymous with *capability,* which is the state or quality of being capable. *Capable* is defined as "having adequate ability; efficient, able, qualified." Standard Dictionary, *sub nom.* capacity.

> "Capacity to perform a duty includes not only technical skill, but also proper disposition to use the same."
>
> The Fri, 140 Fed., 123, 124.

Impairment of earning capacity has been held a proper element of damages for personal injuries.

> Vicksburg, etc., R. Co. v. Putnam, 118 U. S., 545.
> Pierce v. Tennessee etc., R. Co., 173 U. S., 1.

Evidence of such impairment is competent on behalf of the injured employee. It seems to us to follow, necessarily, that it is competent for the employer to offer evidence tending to depreciate such impairment.

> "The defendant may prove any facts concerning the plaintiff's habits or conduct which may throw light on the probability of his securing employment and the character and continuity of the same."
>
> Sutherland on Damages (3rd Ed.), Sec. 1248, page 3631.
> Kingston v. Fort Wayne & E. R. Co., 112 Mich., at page 46.

As bearing upon the question of plaintiff's *capacity to earn money,* could defendant present more forceful evidence than plaintiff's own admission that at the very time of the occurr-

ence in controversy he was careless and was acting in direct disobedience of the rules of his employer? We earnestly submit that the defendant has been denied the very important right of having this action tried under a correct interpretation of the Federal act and that serious prejudice has resulted therefrom. The Supreme Court of North Carolina had ruled that the case should be tried again solely for the purpose of determining the amount of damages to which plaintiff was entitled under this act. The act gives to the injured employee the right to offer evidence of the various elements making up the damages sustained. To the defendant the converse right is given to meet the plaintiff's case with evidence tending to minimize or destroy the alleged elements of damage. Can it be said that this right is not denied when the State Court excludes material evidence offered by the defendant which, if admitted, would presumably have resulted in a reduction of the amount of damages awarded? We submit that it would be difficult to conceive a denial of a right under the Employers' Liability Act more clearly harmful than one in which the amount of damages assessed by the jury has been arrived at by the application of an erroneous rule or by the failure to apply a correct rule when such is embodied in a prayer for instruction by the defendant. The act creates a liability "in *damages* to any person suffering injury" while he is employed by an interstate carrier and engaged in interstate commerce.

The interpretation of the word "damages" and the elements which shall constitute such damages necessarily involves a construction of the act and an erroneous interpretation of it, resulting in harm to the party complaining, is the denial of a right under the act and presents a Federal question. That this is true is made manifest by the recent case of *Seaboard Air Line Railway v. Horton*, 233 U. S., 492, in which there was involved the correct interpretation of "assumption of risk," as that expression is used in the Employers' Liability Act, and the judgment of the Supreme

Court of North Carolina was reversed upon the ground that the interpretation by that court of assumption of risk as it exists under the Federal act was erroneously based upon the State law and not upon the principles of the common law. It was also held that there was an erroneous construction of the word "negligence" as used in the Federal act, and the erroneous construction of the act by the Supreme Court of North Carolina was held to be such a denial of a right arising under the act as to give this Court jurisdiction.

In the Horton case a motion was made to dismiss for want of jurisdiction, and denied in the following language of Mr. Justice Pitney:

> "There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the Employers' Liability Act was especially set up or claimed in the State court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act, which, if acceded to, would presumably have produced a verdict in its favor, and consequent immunity from the action, this motion must be denied, upon the authority of *St. Louis, I. M. & S. R. Co. v. McWhirter,* 229 U. S., 265."

In a number of recent cases, decided by this court, the basis of jurisdiction has been the denial of a proper construction and application of the Federal Employers' Liability Act:

St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S., 156.
St. Louis, I. M. & S. Ry. Co. v. Hesterly, 228 U. S., 702.
North Carolina R. Co. v. Zachary, 232 U. S., 248.
Grand Trunk W. R. Co. v. Lindsay, 233 U. S., 42.

Pederson v. D. L. & W. R. Co., 229 U. S., 146.
Bridget McGovern v. Philadelphia & R. Ry. Co., 35 S. C. Rep., 127.

An erroneous construction of the measure of damages under the Federal act has been held sufficient to give the Supreme Court jurisdiction on writ of error to a State court.

Gulf, etc., Ry. Co. v. McGinnis, 228 U. S., 173.

In the case last cited, there was a reversal for error in an instruction of the trial court upon the issue of damages.

In the case of *Michigan Central R. Co. v. Vreeland,* 227 U. S., 59, in error to the Circuit Court of the United States for the Northern District of Ohio, and *American R. Co. v. Didricksen,* 227 U. S., 224, in error to the District Court of the United States for Porto Rico, assignment of error involving the question of the measure of damages under the Federal act were considered, and in each case there was a reversal for erroneous instructions on the measure of damages.

The defendant presented this question in a somewhat different form by its requests for instruction, which were refused, as follows:

> "The plaintiff's right to recover in this action is based upon the act of Congress known as the Federal Employers' Liability Act, and, under the terms of the act, the conduct of the plaintiff cannot be considered as a defense to the action to the extent of destroying the plaintiff's right to recover, but in arriving at the amount of damages you can consider the plaintiff's conduct and the extent to which the injury complained of was brought about by such conduct, and if you find by the greater weight of the evidence that the plaintiff failed to look before attempting to alight from the train at

Wendell, and that by looking he could have seen that the steps were missing, and could have avoided falling under the cars, it is your duty to consider such facts in arriving at your answer to the issue submitted to you." This was the defendant fifteenth exception. (Assignment of error No. 5, printed record, page 4.)

"Under the Federal Employers' Liability Act the conduct of the plaintiff is to be considered by the jury in determining the amount of damages, and in answering the issue in this case you can consider the conduct of the plaintiff, Walter G. Ferebee, at the time of his injury in reduction of the damages which you find he has sustained." (Assignment of error No. 6, printed record, page 5.)

The Supreme Court of North Carolina Committed Error in Confining the Trial to the Single Issue of Damages.

The plaintiff in error assigns as error the action of the Supreme Court of North Carolina in ordering a new trial on the issue of damages alone as follows:

"That the Supreme Court of North Carolina erred in awarding a new trial upon the issue of damages only at fall term, 1913, of said court, this being an atcion arising under the provisions of the act of Congress entitled: 'An act relating to the liability of common carriers by railroads to their employees in certain cases,' approved April 22, 1908, enacted by Congress in pursuance of the power conferred upon and vested in it by article I, section 8, clause 3, of the Constituion of the United States" (Assignment of error No. 1, printed record, page 3.)

This question is also raised by issue tendered by the defendant, by objection and exception to the issue submitted and by exception to instructions, as will appear from the following assignments of error:

"At the second trial the defendant (plaintiff in error) tendered an issue reading as follows: 'What amount shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to plaintiff's own negligence?' The Superior Court refused to submit this issue and the defendant (plaintiff in error) excepted, and the Supreme Court of North Carolina erred in overruling the said exception of the defendant (plaintiff in error)" (Assignment of error No. 2, printed record, page 3).

"The Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to the issue as submitted by the Superior Court at the second trial, which was in the following language: 'What amount of damage is the plaintiff entitled to recover of the defendant on account of its negligence' (Assignment of error No. 3, printed record, page 3)?

"For that the Supreme Court of North Carolina committed error in refusing to hold that the trial court committed error in instructing the jury as follfollows, to-wit: 'The jury is instructed that they will not give any consideration to the issue of negligence or to the issue of contributory negligense. They are instructed by the Court that these two issues are behind us'" (Assignment of error No. 7, printed record, page 5).

It is unquestionably true, as stated by counsel for the defendant in error, and the cases cited sustain the statement, that decisions of a State court of last resort construing a State statute will be followed by the United States courts, but we do not regard this statement as applicable to the present case. Here we have the decision of a State court on a question of practice the result of which is to deny the plaintiff in error a fair trial under a Federal statute. If such result can be brought about by the application of rules of prac-

tice adopted by the State courts, then the State courts would have it within their power to do indirectly what this court has repeatedly said cannot be done directly by State legislation or judicial construction—that is, the power to control the application and effect of the Federal act.

Seaboard Air Line Ry. v. Horton, 233 U. S., 492.
Michigan Central R. Co. v. Vreeland, 227 U. S., 54.

If the result of the action of the Supreme Court of North Carolina, in the present case, in ordering a new trial on the issue of damages was to deny the defendant the right to have the case determined in accordance with the provisions of the Federal Employers' Liability Act, it would seem to follow that the defendant has been denied a right arising under that act. It is true that the North Carolina court has frequently held that it is proper to order a partial new trial or a new trial on one of the several issues arising in the case, but in none of the cases so decided was there involved a Federal statute, and in none of the cases was it so apparent that fairness to the defendant demanded a new trial of all the issues. We say this because the measure of damages under the Employers' Liability Act is determined by a comparison of the conduct of the carrier and that of the injured employee. Section 3 provides:

> "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," etc.

This section has been held to create "a system of comparative negligence, whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier; in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee."

Grand Trunk W. R. Co. v. Lindsay, 233 U. S., 42.
Nrofolk & W. R. Co. v. Earnest, 229 U. S., 114.

Is it not essential that the jury assessing damages under this act should be in possession of the facts of the occurrence in order to properly and fairly estimate the damages to which the employee is entitled; and if this has been denied, is it not clearly the denial of a right arising under the Federal act?

Referring to the power to grant a new trial on the issue of damages alone the Supreme Court of Massachusetts says:

> "It is a power which ought to be exercised with great caution, with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that the error which has crept into one element of the verdict by no means can have affected its other elements."

Simmons v. Fish, 210 Mass., at page 568.

In England a new trial must relate to all the issues, unless both parties consent that it may be restricted to a single issue.

Watt v. Watt (1905), A. C., 115.

The practice of granting a new trial on the issue of damages alone does not seem to prevail in the United States Supreme Court.

Kennon v. Gilmer, 131 U. S., 22.

The practice of granting a new trial on the issue of damages alone in an action for negligent injury has not met the universal and unqualified approval of the Supreme Court of North Carolina. In *Jarrett v. Trunk Co.*, 114 N. C., 302, the court expressed a willingness to re-examine that question, but found it unnecessary to do so in that case because a new trial was awarded on all issues. Mr. Justice Walker, writing the opinion of the court says:

> "We will, however, caution the judges of the Superior Court in respect to such practice, and invite their attention to what is said in *Benton v. Collins*, 125 N. C., at page 91: 'Before such partial new trials, however, are granted, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters,' and we will add, that *before such partial new trial is ordered it should clearly appear that no possible injustice can be done to either party.* In cases of this character we do not know that the practice is generally to be commended. In the case at bar an examination of all the evidence relating to the injury and its cause and the conduct of the plaintiff, as well as of defendant's agents, might show that it is so interwoven with that relating to damage that to fairly ascertain what is a just compensation the plaintiff should receive, if he is entitled to recover at all can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries" (144 N. C., at page 302). (Italic ours.)

We submit that the State courts should not be permitted to administer the Employers' Liability Act in piecemeal, and that he present case is an example of the great harm which will result from such practice. We think it manifest that the result in this case would have been different upon a proper application of the Federal act. That it *might* have been different is the test of jurisdiction and the right to a reversal.

North Carolina R. Co. v. Zachary, 232 U. S., 248.

In conclusion, we earnestly contend that the plaintiff in error is entitled to a reversal of the judgment of the Supreme Court of North Carolina and a new trial upon all the issues involved in this case for error in restricting the trial to the single issue of damages, and, if we are not correct in this, then plaintiff in error is entitled to a reversal for error in excluding evidence of the violation of rules by the defendant in error.

Respectfully submitted,

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Commercial Printing Company, Raleigh, N. C.—Briefs and Records.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

Norfolk-Southern Railroad Company
Plaintiff in Error
v.
Walter G. Ferebee
Defendant in Error

No. 779.

BRIEF OF DEFENDANT IN ERROR IN REPLY TO PLAINTIFF IN ERROR'S BRIEF ON THE MERITS.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

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NORFOLK-SOUTHERN RAILROAD COMPANY,
Plaintiff in Error.
v.
WALTER G. FEREBEE,
Defendant in Error.

No. 779

BRIEF OF DEFENDANT IN ERROR IN REPLY TO PLAINTIFF IN ERROR'S BRIEF ON THE MERITS.

A statement of this case has already been made in a brief heretofore filed in this court by the Defendant in Error in connection with his motions to dismiss for want of jurisdiction and to affirm.

Two assignments of error only are relied on by the Plaintiff in Error, as in its former brief filed herein:

> First: *The conduct of the Supreme Court of North Carolina in ordering a new trial on the issue of damages alone.*
>
> Second: *The claim of the Plaintiff in Error that the trial judge excluded evidence tending to show the violation of Plaintiff in Error's rules by the Defendant in Error at the time of his injury.*

The Plaintiff in Error, in its brief, reverses the order of argument and proceeds upon the declaration that "It was competent for Plaintiff in Error to show violation of the rules by the plaintiff at the time of his injury," and contends that it was not permitted to show on the trial of this

case that the Defendant in Error had violated its rules at the time of his injury.

This contention is without foundation, as the record shows to the contrary.

The question arose in the trial court in the following manner, as will appear from an examination of that part of the record beginning at the bottom of page 26: On the cross-examination of the plaintiff he was asked the question: "Before you reached Wendell you weren't in the baggage car, were you?" This question was excepted to by the Defendant in Error and ruled out by the trial judge.

The following question was then asked the Defendant in Error: "Mr. Ferebee, you testified, didn't you, that the rules under which you were operating prescribed that the place of the baggagemasters when on duty was in the baggage car?" This question was objected to by the Defendant in Error. The objection was sustained and the question was ruled out by the trial court.

The Plaintiff in Error then proceeded to state the purposes for which the questions were asked, which are fully set out on page 27 of the printed record.

The record shows (on page 27) that *"at this period Counsel for plaintiff withdrew the objections to the two foregoing questions and the witness proceeded to say: 'There are written rules, but the orders supersede rules.'"*

The Defendant in Error was then being cross-examined by counsel for the Plaintiff in Error and under questions asked him he testified fully in respect to the matter as follows, (beginning at the top of page 27 of the printed record):

> "I was not in the baggage car sometime before I approached the station at Wendell. I was at my post in the colored coach next to the baggage car sitting on the seat directly in front of the door talking with Captain Foster, the Pullman conductor."

That was a full answer to the first question hereinbefore referred to; that he was not in the baggage car before he reached Wendell.

The witness proceeded to state under further questions from counsel for Plaintiff in Error:

"My place was where I was ordered. I had direction from the conductor. I was not smoking. I have never smoked a cigarette on duty in my life. When the train approached Wendell I walked in the usual way, got my lantern. I don't remember anything about getting my lunch basket. I don't know whether I had it or not. I do not think I had it. Sometimes I got my lunch there fixed when I got to Wendell, and sometimes I put it off there. I don't know whether the lunch basket was found on the ground by me or not. I had my lantern in in my left hand. I did not have the lantern on my arm. I didn't catch hold with my left hand. This was a railroad lantern. I did not make any express examination to see whether there were any steps there or not before I stepped. By holding the lantern down beneath the platform and examining them like a car inspector by the aid of the lantern, I could have seen that the steps were lost. It was a dark night and I could not have seen from the platform whether the steps were there or not. The purpose of the lantern is to give signals. It gives a better light at a distance, far away, than close to you. By making an examination I could have seen with that lantern that the steps were gone. I did not make any examination. The plaintiff testified on his direct examination that he was injured by stepping from the front platform of a passenger coach just in the rear of the baggage car at night by reason of the fact that the steps had been knocked off at the side of the said platform. There was evidence that these steps had been on the train

and used when it left the station at Raleigh, less than an hour before. The plaintiff testified that just before his injury, while he was on the platform and before he started to step down where he supposed the steps were, he had a railroad lantern in his hand, and that by the use of the lantern he could have seen whether the steps were there or not before he stepped, and that he made no such examination to see whether they were there, and that he was at the time both a baggagemaster and flagman." (Page 28, printed record.)

The Defendant in Error was then asked the question, "If the rules of the Defendant Company in force and effect at the time of the injury did not require him, as a flagman, to make such examination and see for himself whether the steps were in good condition before using the steps or attempting to use them?" Counsel for Defendant in Error objected to this question on the ground that the printed rules were the best evidence. This objection was sustained and counsel for Plaintiff in Error excepted. (Page 28, printed record.)

The Defendant in Error had already testified as to his acts and conduct shortly prior to and at the time of the injury. These acts of his were in full possession of the jury and the mere fact that such acts were, or were not, in violation of certain rules could neither add to nor take from them any force whatever, and was in any event evidence only of contributory negligence which had already been passed upon at a former hearing and decided against the Plaintiff in Error.

Counsel for Plaintiff in Error had full opportunity to and it is to be presumed, did, argue the facts in their claim for mitigation of damages.

Again, the Plaintiff in Error cannot be permitted to show the contents of its written or printed rules on cross-examina-

tion. The declared purpose of the question, (page 28 of the printed record), was to show: "That the rules of the defendant company in effect at the time complained of and known to the plaintiff prescribed and required certain duties on the part of the Defendant in Error."

Moreover, the Plaintiff in Error's own printed rules were in its possession and were the best evidence.

Evidently this attempt was made for two purposes: First, to lodge exceptions in the case; second, to get before the jury on cross-examination its printed rules and avoid the necessity of introducing evidence in the case.

The Supreme Court of North Carolina, in this case unitedly held, that this objection was *untenable.*

Can the Plaintiff in Error, while in possession and control of its own book of rules, be heard to complain, when the Court refused to permit it to prove these rules by oral evidence, when it had every opportunity to introduce the written rules?

Summing up the matter, the Plaintiff in Error attempted to show that the Defendant in Error was not in the baggage car at the time of the injury. But it was thereafter permitted to show by the Defendant in Error that he was not in the baggage car; that he was at his post in the colored coach next to the baggage car.

The Plaintiff in Error then attempted to show that the rules under which the Defendant in Error was operating prescribed the baggagemasters' place, when on duty, was in the baggage car; and was clearly attempting, under the form of the question, to have the witness repeat what he had already testified to, to-wit, that the rules under which he was operating prescribed that the place of the baggagemaster when on duty was in the baggage car. These questions were ruled out by the trial judge, but immediately thereafter counsel for the Defendant in Error withdrew all objections to such

questions and counsel for Plaintiff in Error proceeded with its examination as hereinbefore detailed.

The Plaintiff in Error then attempted to show the contents of its printed rules by this witness who was on cross-examination; so the only evidence excluded was the contents of the printed rules and the Plaintiff in Error being in possession of its own printed rules had full opportunity to introduce the same and have them considered when the proper time came for it to introduce such evidence. They could not be offered on cross-examination.

Weeks v. McPhail, 128 N. C., 130.

Under the second proposition, to-wit: "That the Supreme Court of North Carolina committed error in confining the trial to the single issue of damages." We have argued this to some extent in a brief heretofore filed by us in this cause, but beg leave to add the following.

A JURY OF THE PLAINTIFF IN ERROR'S OWN CHOOSING, AT A FORMER TERM, HAD ESTABLISHED NEGLIGENCE AND HAD FOUND THAT THE DEFENDANT IN ERROR WAS NOT NEGLIGENT. THESE ISSUES WERE CLEARLY AND PROPERLY ELIMINATED AND ONLY ONE ISSUE REMAINED TO BE CONSIDERED—THE AMOUNT OF DAMAGES.

A new trial was awarded on this one issue and not a word of objection, nor a single exception came from the Plaintiff in Error, until upon the second trial when the jury awarded larger damages than at the first trial.

On the second trial the Plaintiff in Error introduced evidence in the case and there is no claim that it was deprived of the right to introduce any evidence in respect to the conduct of the Defendant in Error that it might see proper. It

had the right to contradict the Defendant in Error's statement in reference to the occurrence of the injury as well as to introduce its printed rules.

There was no question of diminishing the full amount of damages by any rule of proportion or otherwise in this case, as there was no negligence which could be attributable to the Defendant in Error.

In reply to the question in plaintiff's brief, "Is it not essential that the jury assessing damages under this Act should be in possession of the facts of the occurrence in order to properly and fairly estimate the damages to which the employee is entitled?" we answer: the jury had the full facts from the Defendant in Error, at least so much as the Plaintiff in Error desired to obtain from him and in addition thereto the matter was fully open to the Plaintiff in Error to introduce such evidence as it saw proper. Moreover, it was unnecessary since the Defendant in Error had already been acquitted of any negligence on his part.

We have no fault to find with the case of *Simmons v. Finch,* 210 Mass., cited in Plaintiff in Error's brief (on page 18), in which that court said: "It is a power which ought to be exercised with great caution, with a careful regard for the rights of both parties." The Supreme Court of North Carolina, in the case cited on page 19 of the brief, (*Jarrett v. Trunk Company,* 114 N. C.,) administered a caution to *Judges of the Superior Court* in respect to the granting of partial new trials, in which they lay down the principle that before such partial new trial is ordered it should clearly appear that no possible injustice can be done to either party. But it must be remembered that the partial new trial in the case at bar was granted by the same court, and it is certainly to be presumed that with the matter before them they exercised their discretion with *great caution* and with a careful regard to the rights of both parties, and that it clearly appeared to them that no injustice could be done to either party.

IT WAS WITHIN THE DISCRETION OF THE SUPREME COURT OF NORTH CAROLINA TO GRANT A NEW TRIAL UPON THE QUESTION OF DAMAGES ALONE AND THIS COURT CANNOT REVIEW THE SUPREME COURT OF NORTH CAROLINA UPON THE EXERCISE OF ITS DISCRETION.

It is admitted by the Plaintiff in Error, (page 16 of its brief on the merits), that the act of the Supreme Court of North Carolina in granting a partial new trial in this case is *a question of practice.* It is urged by the Plaintiff in Error that the Employers' Liability Act should be uniformly enforced in every particular. Of course the intention of Congress should be carried out as nearly as possible in all cases; but it is evident that Congress did not intend to regulate or prescribe the *practice* in any court through the enactment of this Statute. When it gave the State Courts concurrent jurisdiction with the Federal Courts it certainly realized that there would be a difference between the mode of practice and procedure in the State and Federal Courts; and it certainly realized that in quite a number of the States the *Code Practice* was in vogue, while in others the *Common Law Practice* prevailed; and in these instances the mode of practice and procedure would necessarily be different.

There can be no question as to the authority of the Supreme Court of North Carolina to grant a partial new trial. It has been the practice in the State of North Carolina for nearly a century.

Key v. Allen, 7 N. C., 523.

Walker, Judge, in delivering the opinion of the Court in the recent case of *Table Rock Lumber Company v. Branch,* 73 S. E. Rep., 164, uses this language:

> "It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial."

To the same effect are the following decisions of the Supreme Court of North Carolina:

Sloan & Sweeney v. Hart, 153 N. C., 183.
Benton v. Collins, 125 N. C., 83.
Strother v. A. & A. Ry., 123 N. C., 197.
Mining Co. v. Smelting Co., 122 N. C., 542.
Rittenhouse v. W. R. Co., 120 N. C., 544.
Pickett v. W. R. Co., 117 N. C., 616.
Jones v. Coffey, 109 N. C., 515.
Boing v. Raleigh, etc., R. Co., 91 N. C., 199.
Price v. Deal, 90 N. C., 290.
Jones v. Mial, 89 N. C., 89.
Roberts v. Richmond R. Co., 88 N. C., 560.
Crawford v. Gueser, 88 N. C., 554.
Lindley v. Richmond R. Co., 88 N. C., 547.
Burton v. W. R. Co., 84 N. C., 194.
Holmes v. Godwin, 71 N. C., 306.

Moreover, it is the practice in a large majority of jurisdictions to grant partial new trials.

The Supreme Court of Massachusetts, in the case of *Stone v. Pentacost,* 210 Mass., 223; 96 N. E. 335, held:

> "Where the Supreme judicial court had previously determined defendant's liability, but ordered a new trial on the measure of damages only because of error in the instructions, only the question of damages was open to contest on re-trial."

Pratt v. Boston Heel & L. Co., 134 Mass., 300.
Thompson v. Pentacost, 206 Mass., 505.

> "When the appellate court on remand limited the new trial to a particular issue, evidence on any other issue was properly excluded."

Kleet v. McInturff, 128 Pac. Rep. (Washington), 1076.

The Supreme Court of Vermont, in the case of *Austin & McCargar v. Langlois,* 74 Atl. Rep., 489, uses this language:

> "Since the one error found upon the record has reference to the question of damages only a reversal limited accordingly is all that justice to the defendant requires."

Radcliff v. Radford, 96 Indiana, 482.
McKoy v. N. E. Dredging Co., 93 Me., 201; 44 Atl., 614.
Police Jury v. Texas P. R. Co., 129 La.; 57 So. Rep., 163.
Evans v. Moseley, 124 Pac. Rep. (Kansas), 422.

THIS COURT HAS REPEATEDLY HELD, THAT MATTERS WITHIN THE DISCRETION OF THE TRIAL COURT WILL NOT BE REVIEWED ON APPEAL OR WRIT OF ERROR.

Oxley Stave Co. v. Butler County, 166 U. S., 648; 41 L. E., 1149.
Ludeling v. Schaffe, 143 U. S., 301; 36 L. E., 313.
Tripp v. Santa Rosa Street R. Co., 144 U. S., 126; 36 L. E., 371.
Buena Vista County v. Iowa Falls R. Co., 112, U. S. 165; 28 L. E., 680.
Yazoo & M. Valley R. Co., v. Adams, 180 U. S., 1; 45 L. E., 395.

The issue of damages in this case was in no way interwoven with the issues of negligence and contributory negligence which had been passed upon, so that it any event the only complaint of a partial new trial must revert back to the

proposition that the Plaintiff in Error was not permitted to show the circumstances surrounding the occurrence at the time of the injury, and the record in this case clearly shows that notwithstanding some objections and exceptions were made to this line of evidence, that counsel for Defendant in Error withdrew all objections thereto, the Defendant in Error, was then cross-examined as a witness by the counsel for the Plaintiff in Error, and that they were permitted to ask him any and all questions they desired upon this subject.

Counsel for Plaintiff in Error cite the case of *Kennon v. Gilmer,* 131 U. S., 22, as an authority tending to show that the practice of granting a new trial on the issue of damages alone does not prevail in the United States Supreme Court. A careful examination of this case fails to disclose any such holding by this Court or any intimation in that direction. This Court in that case simply held that "the appellate court could not render a judgment which the lower court could not have rendered."

If all of the evidence taken at the trial had been sent up it would have disclosed the fact that the Defendant in Error suffered the loss of a hand and a part of his arm; he was scalped, cut and disfigured; that his spine was seriously and permanently injured in two places; that he was rendered deaf in one ear; that he is compelled to carry his head in a stooped position; that he is rapidly approaching paralysis of his lower limbs; that he has been since the accident, and always will be, a sufferer and unable to earn a livelihood; that he has partially lost his power of utterance, and cannot turn his head without turning his whole body; that just before his injury he was a sound, healthy, active, and a happy young man, twenty-eight years of age.

We earnestly contend that the Plaintiff in Error was denied no right, privilege or immunity under the Employers' Liability Act of Congress in the trial of this cause, that the Plaintiff in Error has had a fair and impartial trial and that the jury allowed the plaintiff, after hearing the evidence and witnessing his physical examination by eminent physicians, a reasonable sum for his injuries.

Respectfully submitted,

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

MITCHELL PRINTING CO., Briefs and Records, Raleigh, N. C.

lating exclusively to the subject of damages granted a partial new trial limited to the amount of damages, and on which the court refused to admit evidence as to plaintiff's contributory negligence. *Held* that:

A substantive right or defense under the Federal law cannot be lessened or destroyed by a state rule of practice, and ordinarily damages and contributory negligence are so blended that only in rare instances can the question of amount of damages be submitted to the jury without also submitting the conduct of the plaintiff.

In this case, however, as defendant had not asked for a modification of the special verdict or to introduce newly discovered evidence, nor offered any such evidence on the second trial, the question of damages could be considered without also considering that of plaintiff's contributory negligence as that question had been entirely eliminated from the case, and the defendant was not deprived of any Federal right.

The practice of granting a partial new trial in actions under the Federal Employers' Liability Act is not to be commended.

167 N. Car. 290, affirmed.

THE facts, which involve the construction and application of the Federal Employers' Liability Act and the validity of a verdict and judgment in an action thereunder against the carrier, are stated in the opinion.

Mr. Murray Allen, with whom *Mr. W. B. Rodman*, *Mr. John H. Small* and *Mr. R. W. Sims* were on the brief, for plaintiff in error:

It was competent for defendant to show violation of its rules by plaintiff at the time of his injury.

The Supreme Court of North Carolina committed error in confining the trial to the single issue of damages. *American R. R.* v. *Didricksen*, 227 U. S. 145; *Grand Trunk Ry.* v. *Lindsay*, 230 U. S. 42; *Gulf &c. Ry.* v. *McGinnis*, 228 U. S. 173; *Jarrett* v. *Trunk Co.*, 144 N. Car. 302; *Kingston* v. *Railroad Co.*, 112 Michigan, 6; *Kennon* v. *Gilmer*, 131 U. S. 22; *McGovern* v. *P. & R. Co.*, 35 S. C. Rep. 127; *Michigan Cent. R. R.* v. *Vreeland*, 227 U. S. 59; *Nor.*

Car. R. R. v. *Zachary*, 232 U. S. 248; *Nor. & West. R. R.* v. *Ernest*, 229 U. S. 114; *Pierce* v. *Railroad Co.*, 173 U. S. 1; *Pederson* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; *St. L., I. M. & S. Ry.* v. *Hesterly*, 228 U. S. 702; *St. L., I. M. & S. Ry.* v. *McWhirter*, 229 U. S. 265; *St. L., S. F. & T. Ry.* v. *Seale*, 229 U. S. 156; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Simmons* v. *Fish*, 210 Massachusetts, 568; Sutherland on Damages (3d ed.), § 1248; *The Fri*, 140 Fed. Rep. 123, 124; *Vicksburg &c. R. R.* v. *Putnam*, 118 U. S. 545; *Watt* v. *Watt* (1905), A. C. 115.

Mr. Clyde A. Douglass and *Mr. William C. Douglass* for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

Ferebee was employed by the Norfolk Southern Railroad Company as a trainhand on a passenger train running from Raleigh, North Carolina, to Norfolk, Virginia. During the night, at some place on the journey the steps to the platform of one of the cars were torn away by coming in contact with some unknown obstruction. The consequence was that when Ferebee attempted to alight at a station, he stepped from the platform to the ground and received personal injuries for which he brought suit in the Superior Court of Wake County, North Carolina, under the Federal Employers' Liability Act (35 Stat. 65). The Company defended on the ground that the plaintiff had been guilty of contributory negligence in attempting to leave the car while it was in motion; in failing to hold on to the handrail; in failing to use his lantern and in failing to discover that the steps were missing. There was a trial in which, under the North Carolina practice, the jury returned a special verdict, finding, among other things, (1) that the Railroad Company was negligent, and (2) that the plaintiff was not guilty of contributory negligence.

The case was then taken to the Supreme Court of the State which, because of an error in the charge on the subject of damages, granted a partial new trial and remanded the case for a hearing in which the only question to be considered was the amount to be awarded the plaintiff. 163 Nor. Car. 351.

At the second trial the plaintiff, on cross-examination testified that when he left the car for the purpose of assisting passengers, he had in his hand a railroad lantern and by holding it beneath the platform and "making an examination like a car inspector" he could have seen that the steps had been torn away. He testified that he made no such examination and owing to the construction of the lantern—throwing light from the side instead of from the bottom—he did not see that they were missing. On motion of the plaintiff this evidence was excluded. Later the objection was withdrawn and the testimony admitted. On further cross-examination the plaintiff was asked if the rules did not require him to make such examinations. This evidence was excluded on the ground, among others, as stated in the argument here, that the rules themselves were the best evidence. The court refused to submit to the jury the question as to how much should be deducted from the damages sustained because of the plaintiff's contributory negligence, for the reason that the Supreme Court of North Carolina had granted a new trial to assess damages and had thereby excluded the issue of contributory negligence from the case.

The jury found for the plaintiff—the amount being somewhat larger than that named in the first verdict. The judgment thereon was affirmed. 167 Nor. Car. 290. The Company then brought the case here by writ of error, in which it contends that it was error for the Supreme Court to grant a partial new trial in which the question of damages only could be considered, inasmuch as the Employers' Liability Act entitles the defendant in all cases

to prove contributory negligence in mitigation of damages. On the other hand, the defendant in error contends that the question as to whether there should have been a partial new trial was a matter of procedure to be governed by the practice of the State of North Carolina.

But a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury.

But this record, in connection with the special-finding first verdict, shows that in this case the two matters were in fact separable, so that the splitting up the issues and granting a partial new trial did not in this particular instance operate to deprive the defendant of a Federal right. For it appears that Ferebee had nothing to do with the loss of the steps and was not guilty of contributory negligence in failing to see that they were missing. His conduct at the time of his fall could not, therefore, affect the amount of the verdict so that it was possible, on the second trial, to award damages without considering the conduct of the plaintiff or retrying the question of contributory negligence.

The new trial was granted at the instance of the Railway Company. It did not ask the Supreme Court for a rehearing, or for a modification of the mandate, or for permission to introduce newly discovered evidence, nor was there any offer of such newly discovered evidence on the second trial. That offered and excluded was not in the nature of newly discovered evidence and the ruling of the trial court in reference to such evidence was in

accordance with the mandate of the Supreme Court. The other matters relied on here for a reversal involve no construction of the Federal Act and are not of a nature to warrant this court in granting a new trial. *Seaboard Air Line* v. *Duvall*, 225 U. S. 486.

Under the facts, therefore, it cannot be said that the decision operated to deprive the Railway Company of a Federal right. But we recognize that the practice is not to be commended. Before granting partial new trials, in any case under the Federal Employers' Liability Act, it should, as said by the Supreme Court of North Carolina, "clearly appear that the matter involved is entirely distinct and separable from other matters involved in the issue . . . and that no possible injustice can be done to either party. In cases of this character we do not know that the practice is generally to be commended." The North Carolina court further said in that case:—"An examination of all the evidence relating to the injury and its cause and the conduct of the plaintiff, as well as of defendant's agents, might show that it is so interwoven with that relating to damage that to fairly ascertain what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries." *Jarrett* v. *Trunk*, 144 N. Car. 299, 302. See also *Simmons* v. *Fish*, 210 Massachusetts, 568. *Kennon* v. *Gilmer*, 131 U. S. 22, 28, deals with the Federal practice in somewhat similar cases.

Judgment affirmed.